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| PEOPLE OF THE STATE OF ILLINOIS, | ) |
| Plaintiff-Appellee, | ) APPEAL FROM THE |
| vs. | ) CIRCUIT COURT OF COOK COUNTY |
| EUGENE WOODS, | ) HON. WILLIAM S. WHITE, |
| Defendant-Appellant. | ) JUDGE PRESIDING. |

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

This is an appeal from an order of the Circuit Court dismissing the petition of Eugene Woods under the Post-Conviction Hearing Act, ch. 38, Ill.Rev.Stat.1969, pars.122-1 et seq.

The record reveals that appellant entered a plea of guilty to a charge of attempt robbery on October 22, 1966, and was sentenced to five years probation conditioned upon the service of one year in the House of Correction. On March 6, 1969, appellant, while on probation, was convicted on the misdemeanor charge of criminal damage to property and was sentenced to serve one year in the House of Correction. On September 11, 1969, after an evidentiary hearing, defendant's probation was revoked and he was sentenced to serve two to ten years in the penitentiary on the attempt robbery conviction. The order revoking appellant's probation was affirmed in People v. Woods, 273 N.E.2d 53 (54744).

On May 4, 1970, after appellant had completed serving his one year sentence on the misdemeanor conviction for criminal damage to property, he filed pro se a post-conviction petition. In this petition he alleged that he was not proven guilty beyond a reasonable doubt on the charge of criminal damage to property in violation of his constitutional rights. He also asserted that his trial counsel was not prepared for trial and that he failed to object to certain questions by the State's Attorney.

Defendant further alleged that he did not receive a fair trial because the trial judge was prejudiced against him. On motion by the State, the Circuit Court dismissed defendant's petition. He appealed directly to the Supreme Court, and the cause was transferred here.

On appeal, defendant contends that the trial court erroneously dismissed his post-conviction petition on the ground that he had already completed serving the one year sentence on the misdemeanor conviction prior to filing his petition. We have examined the record and find that it reflects only the trial judge's conclusion that the defendant should have pursued an appeal of his misdemeanor conviction. We are in accord with the court's action.

Section 122-1 of the Post-Conviction Hearing Act states in part:

> Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. (ch.38, Ill.Rev.Stat.1969, par. 122-1)

As stated in People v. Ferree, 40 Ill.2d 483, 484, 240 N.E.2d 673, 674, Section 122-1 of the Post-Conviction Hearing Act is jurisdictional in nature and limits the subject matter reviewable under the Act. Since none of the allegations of constitutional violations raised in appellant's petition are related to the proceedings which resulted in his conviction on the attempt robbery charge, they are not reviewable under the Post-Conviction Hearing Act. The trial court was, therefore, correct in dismissing the petition.

Because of our decision herein, we need not consider defendant's contention that the legal representation afforded to him by court-appointed counsel in the post-conviction proceeding was inadequate.

The decision of the Circuit Court is affirmed.

AFFIRMED.

ADESKO AND DIERINGER, JJ.,

CONCUR. (ABSTRACT ONLY)

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Respondent-Appellee, | ) | CIRCUIT COURT |
| | ) | OF COOK COUNTY. |
| vs. | ) | |
| | ) | |
| SIMON REDMOND, JR., a/k/a SIMON REDMON, | ) | HONORABLE |
| | ) | ABRAHAM W. BRUSSELL, |
| | ) | PRESIDING. |
| Petitioner-Appellant. | ) | |

PER CURIAM (Second Division, First District):

In 1962, defendant pleaded guilty to a charge of murder and to three charges of armed robbery. He was sentenced to a term of forty to seventy-five years on the murder charge and to twenty to forty years on each of the armed robbery charges, the sentences to run concurrently.

In 1968, he filed a pro se Post Conviction Petition. (Ill.Rev.Stat., 1967, Chap. 38, Par. 122-1 et seq.) The Public Defender filed his appearance for defendant and the State's Attorney filed a motion to dismiss. Subsequently, in 1968, the Public Defender filed an amended Post Conviction Petition alleging that certain of defendant's constitutional rights were violated because, when he pleaded guilty, he was of such low intelligence that he did not comprehend and understand the court's admonishment; that his attorneys did not communicate to him the nature of the proceedings, and that he did not fully understand the effect of his guilty pleas. The State's Attorney filed a motion to dismiss the amended petition. After a non-evidentiary hearing in 1969, the trial court dismissed the amended petition. Defendant appealed to the Supreme Court of Illinois, which, on the motion of defendant, remanded the cause to the Circuit Court for an evidentiary hearing. The State's Attorney filed an answer to the amended petition and in 1970, Judge Brussell, the judge who had accepted the guilty pleas, held a full evidentiary hearing, rendered an oral opinion, and

dismissed the amended petition. Defendant appealed to the Supreme Court of Illinois which transferred the cause to this Court.

Defendant initially contends that he was incompetently represented by the Public Defender with regard to the Post Conviction Petition because the latter filed a short amended petition in place of defendant's lengthy pro se petition and then, at the hearing on the State's motion to dismiss, disparaged the main point raised in defendant's pro se petition. He also argues that the Public Defender incompetently represented him at the evidentiary hearing because he did not contest the adequacy of the trial court's admonitions given at the time he pleaded guilty and did not object to defendant's two trial attorneys testifying for the State on the evidentiary hearing. We find defendant's contentions are without merit.

It is well settled that in order to establish incompetence of counsel, actual incompetent representation and substantial prejudice to the defendant as a result thereof must be established. People v. Ashley (1966), 34 Ill.2d 402, 411, 216 N.E.2d 126.

Competency is shown where (1) the attorney appointed consults with defendant, (2) ascertains his alleged grievances, (3) examined the record of the proceedings at the trial and (4) then amends the petition that has been filed pro se, so that it would adequately present the defendant's constitutional contentions. People v. Slaughter (1968), 39 Ill.2d 278, 285, 235 N.E.2d 566.

The record shows that the Public Defender interviewed defendant in the penitentiary, amended the pro se petition to present defendant's constitutional objections, and had examined the record of the proceedings at the trial before the hearing.

Defendant's contention that the Public Defender who represented him on the State's motion to dismiss disparaged one of his main points (i.e., that he [defendant] was of low intelligence), even if true, is irrelevant on this appeal because the dismissal

of the amended petition was reversed by the Supreme Court and the matter remanded for an evidentiary hearing.

Defendant also argues that the Public Defender replaced defendant's twelve page pro se petition with a one and one-half page amended petition which omitted the main issue raised in the original petition. Defendant does not identify that issue, but an examination of the two petitions and of defendant's brief on appeal reveals that the only matters apparently not covered in the amended petition are also not mentioned in defendant's brief, and the record shows that the question of the claimed necessity of a sanity hearing was fully covered in the evidentiary hearing. The amended petition was sufficient to present defendant's main contentions. The fact that relief was not granted at the later evidentiary hearing on the same amended petition does not show incompetence. People v. Stovall (1970), 47 Ill.2d 42, 46, 264 N.E.2d 174, cert. den., 402 U.S. 997.

Defendant further argues that the Public Defender proceeded on the amended petition without defendant's consent. This is immaterial. Defendant had signed the original petition; the amended petition contained all the defendant's contentions which had any merit and, in fact, stated them in a more explicit manner and as constitutional questions. In addition, both the State's Attorney and the Court treated it as signed and agreed to hear the matter as though defendant had signed the amended petition. Defendant was not prejudiced.

In an effort to bolster his claim of incompetence on the hearing on the State's motion to dismiss (which claim as has been noted, was in any event rendered irrelevant by the Supreme Court's reversal and remand), defendant says:

> The amended petition was to be dismissed on January 13, 1969, and during argument the trial judge commented about the unsupported petition and Mr. Robbins, as Assistant State's Attorney, stated in reply about petitioner's lawyers:

> Mr. Robbins: Right. Oh, they (the public defender's office) could have done a lot of things, Judge. (R. 109).

This reference to "petitioner's lawyers" and the insertion in the quotation of "(public defender's office)" is unfounded because a close reading of the transcript of that hearing shows that the reference was to defendant's mother and common-law wife and not to the Public Defender's office.

Defendant also raises as error below, and as further evidence of the incompetence of counsel on the evidentiary hearing, the fact that the Public Defender did not object to the testimony for the State of the two attorneys who represented defendant on the pleas of guilty; he maintains that their testimony came within the lawyer-client privilege, and that it also violated his constitutional right to counsel.

We find no merit to these contentions because defendant had put in issue the voluntariness of his pleas of guilty. This obviously drew into question the conduct of the trial attorneys and entitled them to testify concerning the matters charged. The American Bar Association Standards for Criminal Justice (Tentative Draft 1970), Section 8.6(c) and Commentary. There was no legal basis for the Public Defender to object to their testimony at the evidentiary hearing. Contrary to defendant's assertions, the record clearly shows that defendant's counsel were not incompetent in their representation at any stage of the proceedings. People v. Johnson (1972), 7 Ill.App.3d 92, 94, ___ N.E.2d ___.

Defendant further argues that defendant's counsel on the evidentiary hearing did not make an issue of the adequacy of the warnings given when defendant pleaded guilty. Prior to the acceptance of the guilty pleas by the trial judge, the following colloquy occurred:

> THE CLERK: People of the State of Illinois versus Simon Redmon.

THE COURT: The defendant, Simon Redmon, is before the Court now?

MR. CERNEK: Yes, your Honor. May I proceed?

THE COURT: Proceed. Does he have some of his family here?

MR. CERNEK: Yes, your common law wife and your mother, is that right?

THE DEFENDANT REDMON: Yes.

MR. CERNEK: May I proceed, your Honor?

THE COURT: Yes.

MR. CERNEK: Your Honor, both Mrs. Johnstone and I, who represent the defendant, Simon Redmon, with reference to the indictments presently pending before this Honorable Court, have investigated the facts and done research on the law with reference to the charges pending against him. We have conferred with our client on many occasions, with reference to the several charges. We have also conferred with his mother here today. At this time, your Honor, the defendant, Simon Redmon authorizes and instructs Mrs. Johnstone and I to ask leave of this Honorable Court to withdraw certain of his pleas of not guilty heretofore entered to certain of the indictments pending and to enter his pleas of guilty with reference to those indictments.

THE COURT: Which indictments are we discussing now, Mr. Cernek?

MR. CERNEK: The defendant wishes leave to withdraw his plea of not guilty in indictment 61-2737, wherein he is indicted for the crime of murder, committed on the 16th day of August, 1961, in which he shot and killed one William Carl Winkler.

The defendant further asks leave to withdraw his plea of not guilty heretofore entered in indictment 61-2736, wherein he in [sic] indicted for having committed the crime of armed robbery on the 16th day of August, 1961, of one Edward Horan.

The defendant, Simon Redmon, further asks leave of this Honorable Court to withdraw his plea of not guilty heretofore entered in indictment 61-2820, wherein he is charged with having committed a robbery while armed with a pistol on the 7th day of October, 1961, of one Peter Vacka.

The defendant, Simon Redmon, further asks leave of this Honorable Court to withdraw his plea of not guilty heretofore entered and enter a plea of guilty in indictment 61-2821, wherein he is charged with the crime of robbery while armed with a knife, of one Jerome Phelps on the 9th day of October, 1961.

Those are the indictments which the defendant asks leave at this time to withdraw his present several pleas of not guilty and to enter a plea of guilty to each of the indictments.

THE COURT: That leaves pending one indictment, number 61-2819, is that right?

MR. CERNEK: Yes, your Honor.

THE COURT: Mr. Simon Redmon, you have heard your attorney advise me in open court that you wish to change your pleas of not guilty in certain indictments, to pleas of guilty in those four indictments. Is that correct, Mr. Redmon?

THE DEFENDANT REDMON: That's right, your Honor.

THE COURT: Is this your mother?

THE DEFENDANT REDMON: Yes, it is.

THE COURT: What is your name, please?

MYRTLE REDMON: Myrtle Redmon.

THE COURT: You are the mother of the defendant?

MYRTLE REDMON: Yes.

THE COURT: Who is this lady over here?

THE DEFENDANT REDMON: Common law wife.

THE COURT: What is your name?

ODESA GUYTON: Odesa Guyton.

THE COURT: Where do you live?

ODESA GUYTON: 1422 South Komensky.

THE COURT: Where do you live, Mrs. Redmon?

MYRTLE REDMON: 1900 West Washington Boulevard.

THE COURT: Mr. Redmon, I have the duty to advise you of certain consequences that may fall upon you on these four pleas of guilty. I want to take them up separately with regard to these indictments.

I want to ask the defense counsel, first of all, are they electing to proceed under the provisions of the new Criminal Code, which became effective January 1, 1962, or are they asking the Court to proceed under the Criminal Code that was in effect prior to that date?

MR. CERNEK: We are asking your Honor to proceed and we wish to proceed, your Honor, under the new Criminal Code in effect January 1, 1962.

THE COURT: That is with regard to all four indictments?

MR. CERNEK: With reference to all four indictments.

THE COURT: Simon Redmon, before accepting your plea of guilty to indictment 61-2737, I have the duty to advise you that on your plea of guilty to this indictment, which charges you with the crime of murder of one William Winkler,

under our law the various penalties that the Court may impose for one either convicted of murder or who pleads guilty to the crime of murder without a trial, the Statute says that a person convicted of murder -- and that applies to one who pleads guilty as well as one who is tried -- shall be punished by death or by imprisonment in the State Penitentiary for any indeterminate period of years, with a minimum of not less than fourteen years. That is the penalty that is applicable in this proceeding here and these are the limits of the penalties that the Court may impose.

With regard to indictment 61-2736, which charges you with armed robbery committed on August 16, 1961, from one Edward Horan, under the Statute of the State of Illinois, one who is convicted of armed robbery or pleads guilty to armed robbery, shall be imprisoned in the State Penitentiary for any indeterminate term of years, with a minimum of not less than one year and there is no limit to the maximum number of years.

Similarly, with regard to indictment 61-2820, which charges you with armed robbery on October 7, 1961 of one Peter Vacka, what I said in regard to indictment 2736 applies to indictment 61-2820 because each indictment is considered separately, Mr. Redmon. One who is convicted of armed robbery, which includes a plea of guilty to the offense of armed robbery, shall be imprisoned in the State Penitentiary for any indeterminate term of years, the minimum not less than one year.

And with regard to indictment 61-2821, which charged you with the armed robbery of one Jerome Phelps on October 9, 1961, similarly, on your plea of guilty, you may be imprisoned in the State Penitentiary for any indeterminate term of years with a minimum of not less than one year.

I also want to advise you, Mr. Redmon, with regard to each and all of these separate indictments, that under our system of law you have a right to a trial by jury if you so desire a trial by jury. When you enter a plea of guilty and the plea of guilty is accepted, it means you automatically and immediately give up your right to a trial by jury.

I have tried to explain, Mr. Redmon, the possible consequences that may fall upon you when the Court accepts these four pleas of guilty and I have outlined the possible penalties, and also pointed out that you are giving up your right to a trial by jury. After all this, Mr. Redmon, do you still persist in your plea of guilty and do you want the Court to accept these pleas of guilty?

THE DEFENDANT REDMON: Yes.

THE COURT: You discussed this with your attornies [sic] prior to this?

THE DEFENDANT REDMON: Yes.

THE COURT: Your mother, also?

THE DEFENDANT REDMON: Yes.

THE COURT: Let the record show that the defendant has been advised of the consequences of these four pleas of guilty to these four indictments and after being so advised, persists in the pleas of guilty to these four separate indictments. These four pleas of guilty therefore will be accepted. In indictment 61-2737 there will be a finding of guilty of murder in manner and form as charged in the indictment and there will be a judgment on that finding.

In indictment 61-2736 there will be a finding of guilty of armed robbery, in manner and form as charged in that indictment and there will be judgment on the finding.

In indictment 61-2820 there will be a finding of guilty of robbery while armed, in manner and form as charged in this indictment and there will be a judgment on this finding.

In indictment 61-2821 there will be a finding of guilty of robbery while armed, in manner and form as charged in this indictment and there will be judgment on this finding.

(Which were all of the proceedings had on the change of plea in the above-entitled cause.)

An examination of the foregoing transcript of the hearing shows that the Court's admonitions were adequate because they well advised defendant of his possible sentences; and an examination of the transcript of the evidentiary hearing discloses that defendant was questioned closely about each of the judge's statements, and that the trial judge found that, despite defendant's claims to the contrary, he understandingly entered his pleas of guilty.

Defendant also argues that the record is not clear that defendant understood what was occurring when he pleaded guilty to four indictments, since the admonitions were not determined to be understandable.

No precise formula can be set out from which the trial court can make a determination of whether the waiver of a jury trial is understandingly made and each case must be viewed in the light of its own facts. People v. Sadeghzaden (1970), 124 Ill.App. 2d 375, 381, 260 N.E.2d 447.

It is settled law that, absent highly unusual circumstances, an accused whose attorney waives a jury trial in his presence in open court is deemed to have acquiesced and is bound by the action of his

attorney. People v. Sailor (1969), 43 Ill.2d 256, 260, 253 N.E.2d 397; People v. Suriwka (1971), 2 Ill.App.3d 384, 389, 276 N.E.2d 490; People v. Kaprelian (1972), 6 Ill.App.3d 1066, 1071, ___ N.E.2d ___. The trial court is entitled to rely upon the professional responsibility of the attorney and to presume from his waiving a jury trial that his client knowingly and understandingly consented to this procedure. People v. Suriwka (1971), 2 Ill.App.3d 384, 389, 276 N.E.2d 490; People v. McClinton (1972), 4 Ill.App.3d 253, 255, 280 N.E.2d 795.

Defendant's claim that he lacked understanding is not borne out by the foregoing quotations from the record. Defendant was represented by two attorneys from the Committee on Defense of Prisoners. His mother and common-law wife were present in court. Defendant conferred with his mother and attorneys before entering his pleas of guilty and it is clear from the portion of proceedings set out above that the trial judge before accepting them explained to defendant the charges involved, the consequences of his pleas, the possible penalties for each, and that he was giving up his right to a jury trial.

Defendant, citing Supreme Court Rule 401 and People v. Terry (1969), 44 Ill.2d 38, 253 N.E.2d 383, also argues that the trial court's explanation of the possible punishments was inadequate in that, as to the murder indictment, it referred to punishment "by death or by imprisonment in the State Penitentiary for any indeterminate period of years, with a minimum of not less than fourteen years" and, as to the three armed robbery indictments, to "imprisoned in the State Penitentiary for any indeterminate term of years, with a minimum of not less than one year and there is no limit to the maximum number of years." However, the record clearly shows that the trial court fully advised defendant of the consequences of his pleas and the charges involved, specifically telling defendant that he was charged with the murder of William Winkler and with the armed robbery of three named individuals.

Since the guilty pleas were entered in 1962, Supreme Court Rule 401 has no application because it did not come into being until years later. The then-applicable rule was Rule 26 (7 Ill.2d 45-46), which required in paragraph (3) that a plea of guilty could not be accepted unless the accused "understands the nature of the charge against him, and the consequences thereof if found guilty." The record is clear that defendant had such understanding.

But even under Rule 401, the court's explanation of the punishments was sufficient. In People v. Gaines (1971), 48 Ill.2d 191, 268 N.E.2d 426, the court distinguished People v. Terry and, citing People v. Scott (1969), 43 Ill.2d 135, 142 (which held that a defendant was sufficiently informed of the consequences of his pleading guilty when he was advised that he "could be sentenced to the penitentiary for any number of years not less than one year"), affirmed as sufficient the admonishment that, upon his plea of guilty, the defendant could be sentenced "to an indeterminate term in the Illinois State Penitentiary for any number of years, and the court can fix the minimum and maximum terms of such sentence." The admonishment here came well within People v. Gaines.

Further, in People v. Eads (1971), 2 Ill.App.3d 411, 413, 272 N.E.2d 293, the court pointed out that People v. Terry does not stand for the "inflexible proposition that the admonishment of a defendant as to a maximum penalty by the use of the term, 'indeterminate' -- the very term used in several sections of the Criminal Code, including that under which the defendant was charged -- requires reversal without reference to the entire record." Defendant here makes no claim that he did not understand the terms "indeterminate" or "minimum".

Also on the evidentiary hearing, the level of defendant's "low intelligence quotient", and the claims that the pleas were not voluntarily and knowingly made and that defendant had pleaded guilty to four out of five indictments, were fully brought to the

trial court's attention and found to be without merit. There was no inadequate representation with regard to them.

Insofar as the report of proceedings is relevant, it shows nothing that would suggest to the court a question of defendant's competency to stand trial. People v. Steffen (1972), 7 Ill.App.3d 700, 288 N.E.2d 532. No motion for a hearing on the issue was filed by his counsel.

Defendant testified on the evidentiary hearing that he had no knowledge that he was pleading guilty to murder. He said his lawyer told him to say "yes" to everything, to plead guilty. He further testified that he was coerced, but did not tell the judge that; nor did he tell the judge that he was not involved in a murder.

Counsel who represented defendant at the time of the pleas testified that he believed that defendant's pleas were made understandingly, intelligently and voluntarily. Counsel further stated that never during his conversations with defendant did the latter give him reason to believe he had a defense to the charges; right from the beginning, defendant said he was guilty on those indictments.

From the record, it is clear that there was no need for any further examination as to defendant's competency. The trial judge was satisfied from the evidentiary hearing, from the hearing when the pleas were accepted, and from the hearing on the State's motion to dismiss the amended petition that defendant fully understood the charges against him and the possible punishments he could receive and that he voluntarily and knowingly pleaded guilty to three charges of armed robbery and one charge of murder. The record clearly reflects that he was not coerced.

The credibility and weight to be given testimony at an evidentiary hearing is to be determined by the trial judge and that determination is not to be questioned unless it is manifestly

erroneous. People v. Watson (1972), 50 Ill.2d 234, 236, 278 N.E. 2d 79. It is not manifestly erroneous here.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

No. 57202

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| GURTZ ELECTRIC CO., a corporation, Plaintiff-Appellant, vs. MARTIN KAMENIR, Defendant, PREMIER ELECTRICAL CONSTRUCTION CO., Garnishee-Employer-Appellee. | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY<br><br>HONORABLE THOMAS R. CASEY, PRESIDING. |

PER CURIAM (Fifth Division, First District):

This is an appeal by a judgment creditor from an order quashing service of a wage deduction summons on the corporation that employed the judgment debtor.

The issues are (1) whether service upon the receptionist is tantamount to service on the corporation, and (2) whether the employer waived any defects in the process when he moved to vacate the judgment without designating his motion to vacate as a special appearance.

On November 16, 1970, a judgment for $1,844.77 was entered against one Martin Kamenir in favor of the plaintiff, Gurtz Electric Co., based on a confession of judgment note. On January 29, 1971, a wage deduction summons was served on Miss Lynette Dahl, as "agent" of Kamenir's employer, Premier Electrical Construction Co. Conditional judgment was entered on March 8, 1971.

Thereafter, on March 15, 1971, a "Summons after Conditional Judgment" was served on Miss Dahl. On April 2, 1971, final judgment for $1,893.61 was entered against Premier.

On May 12, 1971, a "Garnishment Summons (Non Wage)" was served on Merchandise Mart Bank and Marina City Bank where Premier had accounts. Merchandise Mart Bank, on June 2, answered that it owed $1,950.45 to Premier and Marina City Bank, on June 8, answered that it owed $101.24. Meanwhile, on May 17, 1971, Premier served

notice of motion on Gurtz that on May 19 it would "move to vacate the conditional judgment entered March 8, 1971 and the final judgment entered April 2, 1971, and further move for leave to file defendant's Answer Instanter." In support of this motion on June 4, 1971, Premier filed its "Petition to Quash Service" which recited that "since service had not been obtained on Premier, the court lacked jurisdiction to enter the conditional judgment on March 8 and said conditional judgment is void."

On December 6, 1971, the trial court quashed service of summons in an order which found that the employee upon whom it had been served was not a proper agent for that purpose. The order of the court also vacated the final judgment of April 2, 1971.

OPINION

Plaintiff's first contention that service upon the receptionist, Miss Dahl, is tantamount to service upon the corporation should be rejected. Section 13.3 of the Illinois Civil Practice Act provides that a private corporation "may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of said corporation found anywhere in the state."

In Abron v. Public Pontiac, Inc. (1965), 64 Ill.App.2d 73, 77, 212 N.E.2d 326, 328, the court recognized that whether the individual served is an agent for purposes of service is a factual question:

> Given this conflicting testimony on an issue of fact, we will not substitute ourselves for the trial judge in determining the issue because it is his proper function to judge the credibility of the witnesses.

In Abron, the dispute concerned whether the deputy sheriff properly advised the bookkeeper-employee that the summons should be given to the employer and whether the bookkeeper-employee possessed the proper authority. Since the case before this court involves these same issues, we consider Abron to be controlling. Miss Dahl testified that the Deputy Sheriff told her the summons was for Mr. Kamenir,

another employee. The Deputy testified that he correctly told her the summons was for her employer, Premier. Kamenir corroborated Miss Dahl's testimony that she delivered the summons to him. The trial judge's ruling that Miss Dahl was not a proper "agent" necessarily involved a weighing of the credibility of the two witnesses. This court is not prepared to reverse, absent a showing that the ruling was against the manifest weight of the evidence. Such a showing was not made by plaintiff.

Implicit in the trial court's ruling is a determination that Miss Dahl did not fully understand her duty to present the summons to her employer. Megan v. L.B. Foster Co. (1971), 1 Ill.App.3d 1036, 1038, 275 N.E.2d 426, 427, involved "an intelligent clerk ... who understood the purport of the service of summons." Thus, Megan, relied on heavily by plaintiff, is easily distinguishable from our case.

Plaintiff's second contention is that defendant's motion to vacate, petition to vacate, amended petition to vacate, and affidavits constitute a general appearance. Thus, plaintiff claims that defendant has waived his right to attack the personal jurisdiction of the trial court. Section 20(1) of the Civil Practice Act sets up a procedure to follow in making a special appearance. It also provides: "every appearance, prior to judgment, not in compliance with the foregoing is a general appearance." Under a literal reading of the statute, defendant did not make a general appearance since his section 72 petition was filed after judgment.

The only case cited by plaintiff involving a post judgment appearance is People v. Gregory (1955), 5 Ill.App.2d 374, 125 N.E.2d 300, all other cases being irrelevant. Gregory also involved a motion to vacate judgment after a default judgment. The court apparently rested its decision to deny the motion on alternative grounds. First, defendant waived his right to contest the adequacy of service of process by his failure to make his first appearance a special appearance.

Second, the court found no merit in the defenses alleged. To the extent that Gregory relies on the first point, the case is inconsistent with the weight of authority in Illinois. Thus, plaintiff's second contention is denied.

Affirmed.

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |
| | ) | |
| CHARLES TERRELL, | ) | HONORABLE |
| | ) | FRANK B. MACHALA, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was found guilty after a jury trial of the crime of murder, in violation of Section 9-1 of the Criminal Code, and was sentenced to a term of 14 to 20 years. (Ill.Rev. Stat. 1969, ch. 38, par. 9-1.)

On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt; that the trial court committed error in overruling an objection to the State's method of impeaching a defense witness; and that the trial court improperly allowed testimony as to statements made by defendant as to which the State failed to comply with a pre-trial defense request to be supplied with such statements. The pertinent evidence follows:

On the evening of March 28, 1971, four young men, including the deceased, Randolph Stewart, were in a tavern located at 404 West 79th Street in Chicago. At about 10:00 or 10:30 P.M., the young men were put out of the tavern, allegedly because they were under age, and deceased re-entered the tavern to show the bartender some identification papers. The State's evidence conflicts as to what then transpired, but it appears that the deceased was forcibly ejected from the tavern and that on the outside an altercation ensued involving either the deceased and the tavern owner's adult children, who were working at the tavern, or between the deceased on the one hand and the owner's children

and defendant on the other. Defendant and the tavern owner's children were cousins.

Henry Durham, Jr., the tavern owner's son, testified that the deceased struck his sister, Sylvia Durham, and then ran east along 79th Street with the witness in pursuit. The deceased then turned northerly on Stewart Avenue and continued running, with the witness still in pursuit. After pursuing the deceased about a half block along Stewart Avenue, the witness heard gunfire, stopped running, and turned to see defendant behind him holding a gun. Near defendant was one of the three other young men who were in the tavern with the deceased, Alvin Peters. The witness testified that after he heard the gunfire he observed the deceased fall to the sidewalk, that he walked to where the deceased was lying, and that he observed blood coming from the deceased's nose. After the shooting, both the witness and defendant returned to the tavern. The witness testified that he told defendant that "it looks like that boy is dead," to which defendant replied that he "tried to kill the m.....-f..... ." The witness further testified that he did not carry a gun and that he did not have a gun on the night in question.

Alvin Peters testified for the State that he, the deceased and two other companions were in the tavern and that they were asked to leave. He testified that the deceased got into an altercation outside the tavern with Henry Durham, Jr., Sylvia Durham and defendant. After pushing Sylvia down, the deceased took flight and defendant and Henry Durham, Jr. gave chase, running in that order. He testified that he observed defendant pull something from his pocket, that he saw two flashes of gunfire, and deceased fell to the sidewalk. At that time the witness was about 30 feet away, and did not actually see the gun in defendant's hand. Defendant then returned and walked past the witness, and when he was about a foot away from him, he saw defendant place a gun into

his pocket. He testified that Henry Durham, Jr. walked to where the deceased was lying, and stated, "Don't you never hit my sister, I will kill you," but at no time did he see a gun in Durham's hands. He further testified that defendant was about ten yards from the deceased when the shooting occurred, and that the witness was about 25 feet behind Henry Durham, Jr. at that time.

Sylvia Durham testified that the four young men in question entered the tavern shortly before her father arrived, and when they were unable to produce identification of their ages they were asked to leave. She testified that one of the young men returned and questioned the witness as to why he was not allowed to drink. He was again asked to leave, and outside the tavern he got into an altercation with the witness and her brother, during which she was knocked to the ground. When the witness returned to the tavern to clean herself up after the altercation, defendant was not there. She further testified that her brother carried no weapon, and that no weapons were kept in the tavern for protection.

Chicago Police Officer Patton testified that he responded to a radio communication about 10:30 P.M. on the day in question and proceeded to 78th Street and Stewart Avenue, where he found a man lying dead on the sidewalk. He questioned bystanders, but received no response, and then proceeded to the tavern after he overheard someone say, "they went back to 79th Street." A search of the deceased's body and of the area immediately around the body did not produce a weapon. The body was found 150 to 200 feet north of 79th Street on Stewart Avenue.

Chicago Police Officer Milton testified that he questioned the three Durhams concerning the shooting, and that on the morning of March 29, 1971, he arrested defendant at the defendant's home. Defendant asked the officer why he was being sought, and stated that he had no knowledge of the shooting and was not at the scene.

The State's evidence also showed that the deceased was killed by a bullet fired from a .25 caliber automatic pistol and that defendant had three handguns registered in his name with the City of Chicago, one of which was a .25 caliber automatic pistol.

Defendant's wife testified in his behalf that on the evening in question she was tending bar at the tavern with Sylvia Durham. She noticed a disturbance at the tavern about 10:00 P.M. when Sylvia Durham rushed past her, and she observed Henry Durham, Jr. put on an overcoat and place a handgun into its pocket. Both Henry Durham, Jr. and defendant then left the tavern. Defendant owned three handguns, all three of which were purchased in December of 1970 for the protection of her and defendant after she was held up. The .25 caliber pistol was stolen about three months prior to the shooting in question, but the theft was not reported to police to the witness' knowledge. At the time of defendant's arrest the police had a warrant to search for the .25 caliber weapon, but the witness told the police that she had not the faintest idea where it was.

Defendant testified in his own behalf that on the evening in question he heard a commotion outside the tavern. He went outside and saw Sylvia Durham on the ground. He saw Henry Durham, Jr. run around the corner, with three men following him. Defendant followed and when he was about 200 feet from the corner he heard two gunshots and saw the flashes of gunfire coming from in front of him. The only persons in front of him at that time were Henry Durham, Jr. and the deceased. When he returned to the tavern, Henry Durham, Jr. told him that he shot the deceased and that defendant should say nothing about it. Defendant had a .38 caliber weapon drawn during the chase, but he did not fire the weapon. Both he and Durham, Jr. occasionally carried weapons. He did not shoot the deceased.

Also testifying for defendant were two character witnesses and a witness who testified to having seen a gun in the possession of Henry Durham, Jr. on one other occasion.

Officer Milton was recalled in rebuttal and testified that on the night of defendant's arrest, defendant's wife did not tell the officer that the .25 caliber weapon had been stolen prior to the date of the shooting. Sylvia Durham also testified again and stated that defendant's wife told her that defendant shot the deceased and that she (Sylvia) so informed the investigating police officers.

In support of his contention that he was not proven guilty beyond a reasonable doubt, defendant argues that the testimony of Alvin Peters, the only witness who is alleged to have seen the defendant actually shoot the deceased, is self-contradictory and unworthy of belief. He also argues that the record is replete with contradictions and inconsistencies and that no motive is advanced by the State for the shooting.

Defendant argues that Alvin Peters' testimony wavered from the witness' seeing the defendant pull something from his pocket and hearing shots, to his seeing where the shots came from and seeing flashes. He argues that such circumstances, coupled with the fact that the witness was a great distance from the place where the shooting occurred and the fact that the street was not well lighted, make it apparent that Peters' testimony cannot support the conviction.

While that testimony is not contradictory, it does not comprise the only matters testified to by Alvin Peters. Peters also testified that he observed defendant prior to the shooting and that he observed him after the shooting, "face to face," as defendant passed him on the sidewalk, putting a gun into his pocket. On cross-examination the witness did not waver in his testimony that defendant fired the shots.

Defendant also alludes to such matters as whether Henry Durham, Jr. had a weapon during the chase; the relative positioning of the deceased, defendant and Durham during the chase; the fight outside the tavern, etc., to support his contention that the evidence was contradictory and failed to prove his guilt beyond a reasonable doubt. It does not appear that any one or more of the alleged inconsistencies, singly or in combination, raises a reasonable doubt as to defendant's guilt. They have no direct bearing on the shooting and in fact are ancillary thereto. It is further immaterial whether the State did or did not prove a reason or motive behind defendant's act of shooting the deceased; why defendant shot the deceased has no bearing on whether he did, in fact, shoot him.

Further evidence supporting the jury's verdict is Henry Durham, Jr.'s testimony that during the chase of the deceased, he heard two gunshots and that he turned to see defendant behind him holding a gun; defendant also told Durham, Jr. that "I tried to kill the m.....-f..... ." Of further note is the State's evidence that defendant owned a .25 automatic pistol and that a .25 automatic-pistol-type pellet was recovered from the deceased's body.

In any event, it is the jury's function to weigh testimony, to judge the credibility of witnesses, and to determine facts from contradictory testimony. People v. Nicholls, 42 Ill.2d 91, 245 N.E.2d 771. The judgment of the jury will not be set aside on review unless it is so unsatisfactory as to justify a reasonable doubt as to defendant's guilt. People v. Peto, 38 Ill.2d 45, 230 N.E.2d 236.

The evidence adduced by the State, if believed by the trier of fact, was sufficient to prove defendant guilty beyond a reasonable doubt. The cases cited by defendant are not in

point. See People v. Coulson, 13 Ill.2d 290, 149 N.E.2d 96; People v. Ephraim, _____ Ill.App.2d _____, 273 N.E.2d 225.

Defendant next contends that the trial court erred in allowing the State, over a defense objection, to impeach his wife's testimony by silence. He argues that it was improper to impeach her by way of her failure to tell the arresting police officers, who also had a warrant to search for the .25 caliber weapon, that the gun had been stolen sometime before the shooting here in question, as she testified at trial, without showing that she had the opportunity to make such statement to the arresting officers.

The circumstances surrounding the whereabouts of the gun in the instant case are not unlike the situation presented in People v. McMath, 104 Ill.App.2d 302, 244 N.E.2d 330. In McMath the witness who was impeached was working at a gasoline filling station when the victim of a robbery complained to him that she had been robbed. The witness telephoned the police, was present at the station when the police arrived with the defendant who was seated in the rear seat of the police vehicle, and saw the defendant in the auto, yet he did not tell the police that the defendant was with him at the filling station at the time the robbery was alleged to have occurred, as he testified at the trial. The court on review stated that the witness had the opportunity to so inform the police at the filling station, that he knew the defendant was being held for the crime at that time, and that under such circumstances a person would normally make a statement; the court held that the witness was properly impeached by his silence.

In the instant case the witness' husband was being arrested for a crime, the police were looking for a specific weapon and the witness knew these facts; yet she did not tell the police officers that the weapon had been stolen prior to the shooting, as she testified at the trial.

Defendant, however, argues that since his wife was not specifically asked by the officers whether the gun had been stolen, she was not afforded an opportunity to make the statement. It would appear that the mere fact that her husband was being arrested and that the police were looking for a specific gun provided sufficient opportunity and reason for her to make the statement. It would also appear that the police were no more required to ask the witness if the gun were stolen than they were to ask if it had been lost, loaned or destroyed, in order to provide an opportunity of being informed of its disappearance.

Defendant finally contends that the trial court committed error in denying his motion for a new trial because the State introduced statements made by him after failing to comply with a pre-trial order to supply the defense with a list of witnesses to any oral statements made by him. He argues that he was entitled to know that the State intended to introduce his statements made to Officer Milton (that defendant was not at the scene of the shooting on the night in question), and to Henry Durham, Jr. (that defendant had "tried to kill the m.....-f..... .").

As to the first statement, defense counsel objected to Officer Milton's testimony as to what defendant stated upon his arrest, on the ground that defendant was not supplied with either the statement or the list of witnesses thereto prior to trial. During a conference in chambers concerning the objection, the State related that the officer would testify that defendant stated to him that he knew nothing of the incident and was not at the scene, to which defense counsel replied, "Was there anything else he said?" Upon receiving a negative response from the State, defense counsel stated, "put that in, I will withdraw my objection," and "I am withdrawing my objection."

As to the second statement, that the defendant told Henry Durham, Jr. after the shooting that he "tried to kill the m.....-f.....," no objection was interposed when that testimony was elicited from Durham, Jr. Defense counsel objected to the form of the question asked as to whether defendant and Durham, Jr. spoke to each other after the shooting and also objected to another question which had already been asked, but he made no objection to the question and answer here involved.

The objection interposed to the first statement was withdrawn and no objection was made as to the second statement. These matters were therefore waived. See People v. Trefonas, 9 Ill.2d 92, 136 N.E.2d 817 and People v. Humphrey, 129 Ill.App.2d 404, 262 N.E.2d 721.

The judgment is affirmed.

A F F I R M E D.

(Publish abstract only.)

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| CITY OF CHICAGO, a municipal corporation, | ) | |
| Plaintiff-Appellee, | ) | APPEAL FROM THE |
| v. | ) | CIRCUIT COURT OF |



# STATE OF ILLINOIS

## APPELLATE COURT

10 I.A.3. 79

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 1st day of March A. D. 1973, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

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| CITY OF CHICAGO, a municipal corporation, | ) | |
| Plaintiff-Appellee, | ) | APPEAL FROM THE |
| v. | ) | CIRCUIT COURT OF |

General No. 11595 Agenda No. 72-94

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

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| People of the State of Illinois, | ) | |
| Plaintiff-Appellee | ) | Appeal from Circuit Court Macon County |
| vs. | ) | |
| Howard G. Woodson, | ) | |
| Defendant-Appellant | ) | |

MR. JUSTICE SMITH delivered the opinion of the court:

The circuit court of Macon County revoked the probation of the defendant and imposed a sentence of one to fourteen years for forgery. The defendant appeals and asserts (1) that when a criminal act is the basis for revocation of probation it must be established beyond a reasonable doubt and (2) was the evidence sufficient to prove that the defendant had violated a condition of his probation where the only witness to testify to the alleged criminal act was the defendant's wife? We affirm.

In People v. Crowell, No. 44844, January Term, 1973, the Supreme Court considered the contention that a petition to revoke probation must be established by "clear and convincing

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evidence" and there squarely held that a violation of the conditions of probation must be proved by a preponderance of the evidence. They noted moreover that the General Assembly has specifically incorporated this standard in the new Illinois Code of Corrections,(Ill. Rev. Stat. 1971, ch. 38, par. 1005-6-4(c)), effective January 1, 1973. It would seem to follow that if "clear and convincing evidence" is not required then proof of probation violation beyond a reasonable doubt is not required and defendant's first contention is laid to rest.

The act for which the defendant's probation was revoked was the commission of the offense of criminal damage to property by breaking the glass in the window of the back door of the house of the defendant's parents-in-law. Defendant's wife was staying with them after she and the defendant separated, and she testified that the defendant broke the glass in order to enter the locked house. Defendant testified that his wife let him into the house and told him that their two-year-old son had broken the glass while playing with a sweeper handle. The wife also testified that she had written a note to her parents saying this had happened, but testified on the stand that the note was false and written because the defendant threatened that he would otherwise take the children. She then left with the defendant, packed some clothes and spent the most of the day visiting with him. A friend of the defendant testified that he was in the house and that the defendant and his wife were conversing calmly

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| CITY OF CHICAGO, a municipal corporation, Plaintiff-Appellee, v. | APPEAL FROM THE CIRCUIT COURT OF |

and that she appeared to leave willingly.

The wife had filed a suit for divorce and there was apparently considerable animosity between her parents and the defendant. It could well be said that she may have been influenced by them. The complaint in this case was filed by her father. The defendant and his wife had driven to his brother's home in the afternoon and were advised that detectives had been looking for the defendant because the father had complained to the police that the defendant had broken the glass in his back door. The defendant and his wife drove to the house of a second brother and waited for that brother to return. While waiting there, the defendant, his wife and children were sitting in a parked car in front of the house when the father-in-law accompanied by another approached the car, broke the car window and opened the door. She and the children got out of the car and ran across the street. She testified that she told her father that she wanted to get out of the car, but the defendant had locked the doors.

As we have noted, Woodson's testimony was in part corroborated by his friend as to the voluntary nature. Keller, however, was not in a position to see or to hear what took place at the back of the parents' home as he was waiting in the car and does not therefore corroborate the actual occurrence events. He likewise testified that he did not hear the defendant threaten or "press" Mrs. Woodson.

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An investigator from the sheriff's office testified that the wife and her parents came to headquarters and he accompanied the wife to an apartment where she had left some suitcases containing clothing. Woodson was at that apartment when they arrived. The defendant was advised that he was under arrest for criminal damage to property. They left the apartment. As they walked to the patrol car, Woodson turned and ran. The officer testified that he drew his weapon and called for him to stop. The defendant looked back and said, "Go ahead and shoot, that's what I want". The defendant was arrested about a week later.

At the time of the sentence, the trial judge stated in substance that he found it hard to believe that the glass in the door was broken by a two-year-old child, that the other facts supported the wife's version, that there was a reasonableness of what was in the note, and the defendant's refusal to permit her to leave the car. The trial judge found that "the charges are proved and that Mr. Woodson violated his probation". He likewise concluded the wife was not trying to "get him because of marital dispute". Apparently about two months earlier, the trial judge had occasion to extend Mr. Woodson's probation. He stated that he did so on the basis that the wife would be a good influence and would help the defendant and now finds that that influence is no longer present. He concluded that probation was not rehabilitating this defendant and that it should be terminated.

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| Plaintiff-Appellee, | ) | APPEAL FROM THE |
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It is at once apparent that the basic determination here involves the credibility of witnesses and whether or not the wife or the husband is telling the truth, and whether or not the inconsistencies in the wife's statements are satisfactorily explained. In Crowell the Supreme Court reiterated that it is the trial judge who hears the evidence, who is in a better position to weigh the testimony of the witnesses, and draw the necessary inferences; and that a reviewing court ought not substitute its judgment for that of the trial court unless the judgment is contrary to the manifest weight of the evidence and not under a circumstance where evidence is merely conflicting. (People v. Guido, 25 Ill.2d 204, 184 N.E.2d 858; People v. Majerus, Ill.App., 271 N.E.2d 380.) It should be here noted that after being told he was under arrest for criminal damage to property, the defendant fled. This in itself suggests that it was he rather than the two-year-old child who broke the window and corroborates the wife's testimony.

Accordingly, the judgment of the trial court is affirmed.

Judgment affirmed.

Craven, P.J. and Trapp, J. concur.

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| CITY OF CHICAGO, a municipal corporation, Plaintiff-Appellee, | APPEAL FROM THE |
| v. | CIRCUIT COURT OF |
| MAX L. BENDER and JENNIE BENDER, Defendants, | COOK COUNTY. |
| MAX L. BENDER, Defendant-Appellant. | HONORABLE DAVID CERDA, PRESIDING. |

PER CURIAM:

On January 13, 1972, defendant, Max Bender, a property owner, was found guilty of contempt for failure to obey a court order "entered April 29, 1971, wherein the court ordered the defendants, Max L. Bender and Jennie Bender, to vacate all units except the store before June 24, 1971." Max Bender was fined $2,000 and committed to jail until January 17, 1972. On appeal, defendant argues he was not properly found to be in contempt because 1) the April 29 order (on which the contempt was based) exceeded the relief requested in the original complaint and was illegal, and because 2) the contempt proceedings, themselves, violated due process.

On April 20, 1965, the City of Chicago, a municipal corporation, filed a complaint against Max and Jennie Bender, as owners of a four story and basement brick structure. Count I alleged that use of the premises for 12 units rather than 8 was not in compliance with Article 9.6-1 of the Chicago Zoning Ordinance and asked the court for the "People's Writ of Injunction" requiring defendants to vacate the premises or present plans "to conform the premises to the applicable ordinances" and for other relief. Count II listed 51 specific violations of the Zoning, Building, Housing, Electrical, Plumbing, Health and Fire Ordinances of the City of Chicago and asked for a People's Writ of Injunction to vacate the premises or conform them to the applicable ordinances and for other relief. Defendant was served personally on May 29, 1965 and on December 1, 1965, an order was entered to vacate the

entire building; on January 5, 1966, the order was amended "to allow for 8 units to remain occupied instead of 1." On May 19, 1966 the court appointed "Number Two Chicago Dwellings Association" as Receiver; it was discharged in January of 1968, but was again appointed "for the purpose of vacating" the second, third, and fourth floors of the building in September of 1968.

An order was entered on September 3, 1970, that defendant "shall complete all work to correct Building and Housing Code violations on the subject property before September 10, 1970."

The report of proceedings before Judge Cerda on April 29, 1971, shows the following:

THE COURT: There will be a mandatory order to vacate all dwelling units, that does not include the store.

MR. BENDER: Your Honor, can I continue to keep it. If it is vacant--

THE COURT: If I thought--

MR. BENDER: You are doing me harm if you do that, your Honor. I am telling you, you are killing me by doing that.

THE COURT: Well, over six years you probably said that to other judges.

MR. BENDER: I done a lot on this building, your Honor.

THE COURT: We keep on giving you a chance time and time again. You don't do anything about it. We'll appoint the CDA to vacate.

MR. BENDER: Please don't do that to me. You're hurting me.

THE COURT: You said that to all the other judges, too, and have given you chances.

MR. BENDER: I've been doing work, your honor.

THE COURT: Not in six years.

MR. BENDER: I am working on it right now.

THE COURT: You knew this case was going to come up.

June 24th is the next date in this case.

A petition for a Rule to Show Cause why defendant should not be held in contempt for refusing to obey the April 29 order was filed August 12, 1971. On October 7, 1971, defendant answered that 1) he had not refused to comply with the order; 2) the order was illegal; 3) the order was unconstitutional.

On December 2, 1971, a "Rule to Show Cause," returnable December 9, 1971, was filed and on January 13, 1972, a finding of contempt was entered which stated in part as follows:

> "All parties appeared before the Court and announced ready to be heard on said Motion, hearings were held on JUNE 24, 1971, AUGUST 12, 1971, SEPTEMBER 9, 1971, OCTOBER 7, 1971, NOVEMBER 11, 1971 and DECEMBER 9, 1971, and, after hearing all the evidence offered and being advised of the law, the Court FINDS AND NOW HOLDS that Defendants, MAX L. BENDER and JENNIE BENDER, have purposely and openly violated the injunction of the Court referred to above by failing to complete the said work.
>
> IT IS THEREFORE ORDERED by the Court that Defendants be and they are hereby held in Contempt of Court with relation to the matters referred to."

The question of the contempt power has been most recently reviewed by our Supreme Court in United Mine W. of A. U. Hosp. v. United Mine W. Dist. 50, 52 Ill.2d 496, 288 N.E.2d 455. There, the defendants were held in contempt for violating a temporary restraining order they claimed was void, because it was based on a decision of the Appellate Court which was subsequently reversed by the Supreme Court. Nevertheless, the court held such injunctions, while in force, cannot be disregarded. As the court said: "The issue of whether the restraining order is erroneous is not before the court in a subsequent contempt proceeding for disobedience of the order," and referred the appellants to the holding of the United States Supreme Court in Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed. 1210, where "the court held that even though a city ordinance upon which an injunction was based was probably unconstitutional, the petitioners could not question its constitutionality in a contempt proceeding for the violation of the injunction."

Defendant states in his brief that the April 29, 1971 order did not exist. The record, however, shows that defendant's answer to the Rule to Show Cause admits the existence of the April 29, 1971 order. It is clear from the report of the proceedings on April 29, 1971 that, after much discussion between the court and the defendant, an oral order was entered, that defendant heard the order and that he understood its terms.

Disobedience of a verbal court order may be punished as for contempt. People v. Kennedy, 43 Ill.App.2d 299, 302, 193 N.E.2d 464.

Defendant argues that the procedure followed on January 13, 1972 violates due process, but he has not filed a Report of Proceedings as to what transpired on that day. As the court has said under similar circumstances: "The defendant does not bring the report of proceedings to this court. We assume that the omitted part of the record sustains the finding." People v. Ackerman, 52 Ill. App.2d 296, 202 N.E.2d 98. Moreover, the order entered on January 13, 1972 flatly contradicts defendant's assertion.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

PER CURIAM

NO. 56747

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| PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, | ) | APPEAL FROM CIRCUIT COURT COOK COUNTY |
| vs. | ) | |
| PHILIP M. DOYLE, Petitioner-Appellant. | ) | HONORABLE EDWARD E. PLUSDRAK, PRESIDING. |

PER CURIAM:

Philip M. Doyle filed a post-conviction petition, amended with the aid of counsel, in accordance with the provisions of Article 122 of the Criminal Code (Ill. Rev. Stat. 1971, Ch. 38, Art. 122), asking the court to vacate the judgment entered on September 30, 1964, on the jury's verdict of guilty of attempted murder. Petitioner contended that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitutions of the United States and the State of Illinois. The state's attorney filed a motion to dismiss the post-conviction petition, which was sustained on February 8, 1971, without an evidentiary hearing, and the petitioner appealed. An appeal was taken to the Illinois Supreme Court, which transferred the cause to this court.

Petitioner, in his amended petition for post-conviction relief, alleged that he is presently incarcerated in the Illinois State Penitentiary under a sentence of not less than 15 years nor more than 20 years, imposed on September 30, 1964; and that he appealed to the Appellate Court, where the conviction was affirmed on June 16, 1967. See People v. Doyle (1966), 76 Ill. App. 2d 302, 222 N.E. 2d 205. The Illinois Supreme Court denied the defendant's petition for leave to appeal (36 Ill. 2d 629).

The amended post-conviction petition alleged (1) that the petitioner was denied the effective assistance of counsel in

the trial of attempt murder; (2) that he was arrested without probable cause and without a warrant; and (3) that the police conducted an unnecessarily suggestive showup where the victim identified the petitioner as the assailant, which resulted in an illegal in-court identification, all contrary to the Fifth and Fourteenth Amendments of the United States Constitution and Sections 2 and 9 of Article 2 of the Illinois Constitution.

The People filed a motion to dismiss the amended petition on the grounds that the same failed to raise any constitutional questions within the purview of the Post Conviction Hearing Act; that the allegations of the amended petition are not sufficient to require a hearing; and that the doctrine of waiver or res judicata applied to said petition because the Appellate Court of Illinois, First District, had affirmed that original judgment of the trial court in the case of People v. Doyle (1966), 76 Ill. App. 2d 302, 222 N.E. 2d 205 (leave to appeal denied, 36 Ill. 2d 629). The court sustained the People's motion to dismiss the amended petition.

The facts pertaining to the trial and conviction of Philip M. Doyle for the offenses of attempt murder and aggravated battery are set forth in People v. Doyle (1966), 76 Ill. App. 2d 302, 222 N.E. 2d 205: On May 9, 1964, at about two o'clock in the morning, three Chicago police officers, dressed in plain clothes, drove up an alley in a residential neighborhood of Chicago in an unmarked automobile. They stopped three men walking in the alley and announced that they were police officers. Officer John O'Connor testified that he heard one of the men say, "It's the police, let's go," and all three men ran in different directions. Officers O'Connor and Quick apprehended one man, who was left in O'Connor's custody. Officer William Quick then pursued another man with a flashlight in one hand and a gun in the other. After jumping an abutment, he found

himself three feet from the defendant and observed that he had a sawed-off shotgun in his right hand. He testified that he dropped his flashlight, started to reach for the shotgun and was shot in the stomach by the defendant. He said that he then fired three shots at the defendant. The defendant was shot in the finger. The defendant did not testify. A physician, called as a witness by the defendant, testified that the X-rays of the defendant's right hand showed that his right index finger had been fractured and the lower joint completely destroyed by a bullet. People v. Doyle, 76 Ill. App. 2d 302, p. 305.

On direct appeal, the defendant contended that the State failed to prove that defendant intended to kill Quick because the bullet fired by Quick struck defendant's trigger finger and he may have fired back in self-defense and therefore it cannot be said that defendant intended to kill Quick without "lawful jurisdiction"; that the court refused certain instructions offered by the defendant to the effect that, if the defendant did not intend to kill Quick, he would be guilty only of battery or aggravated battery; that the court's refusal to permit the defendant to display his injured hand to the jury was prejudicial; that it was error for the court to permit the State to introduce evidence of the gory, inflammatory details of Quick's wounds; and that it was error for the court to permit evidence of other unrelated crimes.

The alleged illegality of the arrest of the petitioner, the "showup" of petitioner in Weiss Memorial Hospital on May 11, 1964, and the consequential alleged illegality of the in-court identification of petitioner by Officer Quick were not argued by Doyle in his direct appeal to this court. People v. Doyle (1966), 76 Ill. App. 2d 302, 222 N.E. 2d 205.

In the present appeal, the petitioner did not argue the incompetence of his counsel and, therefore, it is considered waived. (Illinois Supreme Court Rule 341 (e)(7); Ill. Rev. Stat. 1971, ch. 110A, par. 341(e)(7)); Gouker v. Board of

Supervisors (1967), 37 Ill. 2d 473, 228 N.E. 2d 881.

Petitioner argues that under the decision in Stovall v. Denno (1967), 338 U.S. 293, 18 L. Ed. 1199, 87 S. Ct. 1967, he was entitled to have counsel present at the showup in Weiss Memorial Hospital on May 11, 1964. In People v. Derengowski (1970), 44 Ill. 2d 476, 256 N.E. 2d 455, the court said that the Stovall decision is not retroactive and, therefore, not applicable to lineups conducted prior to June 12, 1967. As the showup in the case at bar was held on May 11, 1964, it was not necessary to have an attorney present.

Even if it could be argued that the arrest and hospital identification were tainted in any way, those facts would not in themselves render the in-court identification and the conviction invalid provided there was an independent basis for the in-court identification. People v. Bliss (1970), 44 Ill. 2d 363, 255 N.E. 2d 405; People v. Fox (1971), 48 Ill. 2d 239, 269 N.E. 2d 720.

The amended post-conviction petition consists of mere conclusions and is not accompanied by affidavits, records or other evidence in support of its allegations, nor does the petition state why the same are not attached. In People v. Pierce (1971), 48 Ill. 2d 48, 268 N.E. 2d 373, the court said (48 Ill. 2d, p. 50):

> "The Post-Conviction Hearing Act requires that the petition shall clearly set forth respects in which the petitioner's constitutional rights have been violated and that the same shall be accompanied by affidavits, records or other evidence in support of its allegations, or the petition shall state why the same are not attached. We have held many times that unsupported conclusional allegations in a petition are not sufficient to require a post-conviction hearing under the Act and that the petition and supporting affidavits must make a substantial showing of the violation of a constitutional right before a hearing thereon is required. People v. Morris, 43 Ill. 2d 124; People v. Arbuckle, 42 Ill. 2d 177; People v. Brown, 41 Ill. 2d 503; People v. Collins, 39 Ill. 2d 286; People v. Satterwhite, 38 Ill. 2d 138; People v. Evans, 37 Ill. 2d 27."

Also see People v. Westbrook (1972), 5 Ill. App. 3d 970, 974, 284 N.E. 2d 695.

Petitioner has never asserted that he was not the man who shot Officer Quick on May 9, 1964, and the petition sets forth no facts from which it could be presumed that he was not the man who shot Quick.

The petition consists only of legal conclusions which were insufficient to require an evidentiary hearing. People v. Stoudt (1970), 45 Ill. 2d 118, 257 N.E. 2d 110.

Finally, the amended post-conviction petition is fatally defective because the questions of whether the petitioner's arrest and his identification as the assailant were legal, could and should have been raised in the trial court and on direct appeal to this court. Petitioner, having failed to do so, has waived his right to raise them in his amended post-conviction petition and to argue them in this appeal.

In People v. Beckham (1970), 46 Ill. 2d 569, 264 N.E. 2d 149, Beckham, after a direct appeal (71 Ill. App. 2d 357, 219 N.E. 2d 139), filed a post-conviction petition, in which he contended that his constitutional rights were violated because, among other things, the manner of his identification was so unnecessarily and unduly suggestive as to deprive him of due process of law. The trial court dismissed the petition without an evidentiary hearing. On appeal, the Supreme Court affirmed the judgment of the trial court, saying (46 Ill. 2d, p. 571):

> "As to defendant's first two contentions, this court has consistently held that 'where a person convicted of a crime has taken an appeal from the judgment of conviction on a complete record, the judgment of the reviewing court is res judicata as to all issues actually decided by the court and all issues which could have been presented to the reviewing court, if not presented, are waived.' (People v. Kamsler, 39 Ill. 2d 73, 74; People v. Armes, 37 Ill. 2d 457; People v. Agnello, 35 Ill. 2d 611; People v. Cox, 34 Ill. 2d 66.) Defendant, relying on People v. Hamby, 32 Ill. 2d 291, 294, seeks to avoid the waiver doctrine by requesting a relaxation of that rule in the interests of fundamental fairness. The factual situation in Hamby which prompted us not to apply the waiver doctrine is totally inapposite to that here where there was neither trial nor appellate objection by defendant or his counsel to the identification testimony. The question is not now open to the post-

> conviction attack, nor is the concept of fundamental fairness offended by this result. (People v. Hill, 44 Ill. 2d 299, 302; People v. Agnello, 35 Ill. 2d 611, 613.) Likewise, questions relating to use of the money in both trials were complained of in the initial review. While the current complaint is phrased in double-jeopardy and due-process terms, the same arguments were available in the direct appeal, and are now barred by waiver and res judicata. People v. Cox, 34 Ill. 2d 66, 69."

In People v. Jones (1972), 5 Ill. App. 3d 951, 284 N.E. 2d 418, the defendant filed a post-conviction petition after his conviction for murder had been affirmed in People v. Jones (1968), 107 Ill. App. 2d 1, 247 N.E. 2d 40. This court affirmed the action of the trial court in dismissing the petition without an evidentiary hearing on the ground that (5 Ill. App. 3d, pp. 952-953) "where a full review has once been had by way of direct appeal, any claim which might have been raised therein, but was not, is considered waived."

Also see People v. Mamolella (1969), 42 Ill. 2d 69, 72, 245 N.E. 2d 485, and People v. Johnson (1971), 47 Ill. 2d 568, 268 N.E. 2d 1.

In the case at bar, the petitioner should have raised the issues of illegal arrest and illegal identification in his direct appeal. Having failed to do so, these questions are not now open to post-conviction attack.

The amended post-conviction petition was properly dismissed by the trial court without an evidentiary hearing. The judgment of the trial court is affirmed.

Affirmed.

Publish abstract only.

NO. 56864



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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM CIRCUIT COURT COOK COUNTY |
| vs. | ) | |
| LARRY JACKSON, Defendant-Appellant. | ) | HONORABLE ROBERT J. DOWNING, PRESIDING. |

PER CURIAM:

In a two-count indictment, defendant was charged with the crimes of burglary and theft, in violation of sections 19-1 and 16-1, respectively, of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, pars. 19-1, 16-1.) After a plea bargaining conference, the theft count was nolle prossed. Then, on a plea of guilty, defendant was found guilty of burglary and sentenced to a term of two years to six years in the penitentiary. In this appeal, the sole issue is whether the trial court ascertained if defendant comprehended the nature of his plea of guilty and the preceding plea bargaining agreement, in compliance with Supreme Court Rule 402. (Ill. Rev. Stat. 1971, ch. 110A, par. 402.)

Supreme Court Rule 402 provides that in hearings on pleas of guilty there must be substantial compliance with the following:

> " * * * (b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no plea agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea." (Ill. Rev. Stat. 1971, ch. 110A, par. 402(b).)

After the plea bargaining conference was held and prior to accepting the plea of guilty, the following colloquy occurred:

"MR. DE LEONARDIS (Defense Counsel): Judge, I have had occasion to have a conversation with Mr. Jackson, in regard to this case, and I have informed him of the results of the conference, the results being on a possible plea two to six years in the Illinois State Penitentiary.

"This is the offer made by the Court to me, and communicated by me to Mr. Jackson. I have explained to Mr. Jackson he has a right to persist in his plea of not guilty and take a jury trial on this or take a bench trial.

"He indicated to me he asks me to ask of the Court to withdraw his pleas of not guilty and enter a plea of guilty to the charge. He explained to me he is pleading guilty because he is, in fact, guilty of the charge of burglary; is that correct, Mr. Jackson?

"MR. JACKSON (Defendant): Yes.

"MR. DE LEONARDIS: I have also informed him that the minimum possible sentence on burglary is one year and the maximum is an indeterminate number. Knowing this and understanding this he is still asking me to withdraw the plea of not guilty.

"THE COURT: To both counts?

"MR. DE LEONARDIS: To the burglary count, your Honor.

"THE COURT: To Count I of the indictment? That is just as to Count I?

"MR. DE LEONARDIS: That is correct, sir.

"THE COURT: Mr. Jackson, first of all, you understood everything Mr. De Leonardis stated to you, and you understand when you plead guilty you automatically waive your right to a jury trial?

"MR. JACKSON: Yes.

"THE COURT: Before accepting your plea of guilty, it is my duty to advise you, first of all, Count I charges that on July 17, 1970, to and including July 18, 1970, at and within the County of Cook, you committed the offense of burglary, in that you without authority knowingly entered into a building, to-wit, a store of Cars for Commerce, Inc., a corporation, with the intent to commit the crime of theft therein, in violation of the Illinois Revised Statutes. You are aware of that charge?

"MR. JACKSON: Yes, sir.

"THE COURT: You understand that under the charge in this indictment the Court could sentence you to an indeterminate number of years, with a minimum of one year, do you understand that?

"MR. JACKSON: Yes.

"THE COURT: You understand when you plead guilty there will be no trial of any kind, you waive your

right to a trial by jury and a right to be confronted by the witnesses against you, do you understand that?

"MR. JACKSON: Yes.

"THE COURT: Are you pleading guilty because you are, in fact, guilty of the crime of burglary as I have just read it to you in this indictment?

"MR. JACKSON: Yes, I am.

"THE COURT: All right. Do you understand that there has been a conference and Mr. De Leonardis has reported to you the results of that conference, as he represented to the Court; is that correct?

"MR. JACKSON: Yes.

"THE COURT: And do you understand that except for that conference which has been held, has there been any force, threats or promises been used to compel or induce you to plead guilty?

"MR. JACKSON: None, whatsoever.

"THE COURT: You have a right to persist in your plea of not guilty or to plead guilty, do you understand that?

"MR. JACKSON: Yes.

"THE COURT: Knowing all these matters about which I just questioned you, do you still persist in your plea of guilty to the charge of burglary in Count I of this indictment; is that correct?

"MR. JACKSON: Yes.

"THE COURT: Let the record show that the defendant, having been advised of the consequences of his plea of guilty to this indictment, after being so advised persists in his plea. The plea, therefore, will be accepted.

"Mr. State's attorney, will you tell the Court what the facts are?"

Supreme Court Rule 402 requires a "substantial compliance" with its terms. It is clear from the foregoing excerpts from the record that the Rule's terms have been satisfied here. The defendant's counsel "spread of record" the terms of the plea bargaining agreement and the court and counsel both elicited from defendant, in open court, whether those were the terms of the agreement. It is not necessary that there be a literal or strict compliance with the Rule, or that all matters required

by the Rule be satisfied by the trial judge personally. See People v. Miller, 2 Ill. App. 3d 851, 277 N.E. 2d 898; People v. Reed, 3 Ill. App. 3d 293, 278 N.E. 2d 524.

In People v. Ridley, 5 Ill. App. 3d 680, 284 N.E. 2d 37, cited by defendant, the terms of the plea agreement were not stated "by the trial court or by defense counsel at any time in open court." The Ridley case, and the cases of Boykin v. Alabama, 395 U.S. 238, and Shelton v. United States, 246 F. 2d 571, are inapplicable.

For these reasons the judgment is affirmed.

Affirmed.

Publish abstract only.

57072

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT, |
| vs. | ) | |
| | ) | COOK COUNTY. |
| ROBERT LEE MIMS, Defendant-Appellant. | ) | HON. ROBERT L. HUNTER, Presiding. |

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

This appeal is from the dismissal in the Circuit Court of Cook County of a Petition filed by Robert Mims under the Post-Conviction Hearing Act. (Ill.Rev.Stat. 1969, ch. 38, par. 122-1 et seq.)

In October 1963, the defendant, who had been indicted by the grand jury of Cook County on charges of murder and involuntary manslaughter, sought and was granted leave to withdraw his plea of not guilty and to plead guilty to the charge of murder. He was sentenced to imprisonment for not less than 14 nor more than 18 years. That judgment was affirmed on direct appeal to the Supreme Court in May 1969: People v. Mims, 42 Ill.2d 441, 248 N.E.2d 92.

An examination of the record of the post-conviction proceedings indicates that defendant initially filed a pro se Post-Conviction Petition in March 1966. That Petition was dismissed by the Circuit Court of Cook County and the defendant appealed to the Supreme Court. The Supreme Court in February 1969, prior to the rendition of its opinion affirming the judgment on direct appeal in May 1969 (People v. Mims, 42 Ill.2d 441, 248 N.E.2d 92) remanded defendant's Post-Conviction Petition to the Circuit Court when the People confessed error because the defendant had not been adequately represented in the post-conviction proceedings. (Ill.Sup. Ct. Doc. No. 40439, February Term, 1969.) See People v. Slaughter, 39 Ill.2d 278, 235 N.E.2d 566.

Subsequently the Circuit Court appointed counsel to represent defendant in the post-conviction proceedings and counsel filed an amended Post-Conviction Petition in April 1970.

A motion to dismiss the amended Post-Conviction Petition was filed by the People, based on numerous grounds including: (1) that the issues raised by the amended Petition were res judicata by virtue of the fact that they were considered and resolved by the Supreme Court decision on defendant's direct appeal (People v. Mims, 42 Ill.2d 441, 248 N.E.2d 92); (2) that defendant's plea of guilty waived all errors or irregularities not jurisdictional; (3) that defendant was mentally competent during the original proceedings leading to his guilty plea and that his change of plea was the product of a knowing and intelligent waiver of his constitutional rights; and (4) that defendant was adequately represented by counsel during the original proceedings and, at any rate, counsel was privately retained and therefore defendant was bound by their conduct. Hearing on the People's motion was held on July 1, 1970, after which the court entered an order dismissing defendant's amended Petition without an evidentiary hearing.

Defendant appealed the dismissal of his amended Petition directly to the Supreme Court which transferred the cause to this Court. (People v. Mims, Ill.Sup.Ct. Doc. 43792, January Term, 1972; see also Sup. Ct. Rule 651, Ill.Rev.Stat. 1971, ch. 110A, par. 651, as amended July 1, 1971.)

On appeal defendant initially contends that the trial court applied erroneous standards in ruling on the motion to dismiss defendant's amended Post-Conviction Petition. He argues that the court failed to confine its attention to the allegations of the

amended Petition, to accept those allegations as true and to rule on the legal sufficiency of the allegations to state a basis of relief.

The Supreme Court speaking through Mr. Justice Schaefer stated in People v. Slicker, 42 Ill.2d 307, 308, 247 N.E.2d 407, 408:

> "The defendant apparently argues that his right to an evidentiary post-conviction hearing depends solely upon whether his allegations, if true, raise a substantial constitutional question. This argument, however, misconceives this court's prior decisions and ignores the ground upon which his petition was dismissed. Upon a motion to dismiss a post-conviction petition, the trial court may properly render its decision on the basis of 'what is contained in the pleading to which the motion is directed, read***in conjunction with the transcript of proceedings at the trial.' People v. Hamby, 39 Ill.2d 290, 294." (Emphasis supplied)

(See also People v. Jackson, 49 Ill.2d 364, 274 N.E.2d 4.) Upon a review of the record of proceedings, we are of the opinion that defendant was afforded a fair hearing and that the trial court applied the correct standards in ruling upon the People's motion to dismiss defendant's amended Post-Conviction Petition.

The People argue here, as they did in the trial court, that all issues raised by defendant in his Post-Conviction Petition which were considered by the Supreme Court on direct appeal are res judicata and all matters not raised but resulting from the trial record are waived.

The Supreme Court stated in People v. Weaver, 45 Ill.2d 136, 138, 256 N.E.2d 816, 817-18:

> "At the outset we are confronted with the question of whether consideration of the issues raised in the present petition is precluded by application of the doctrines of res judicata and waiver.
>
> "This court has consistently held that the Post-Conviction Hearing Act was not intended to be used as a means of obtaining further consideration of claims of denial of constitutional rights where a

> review of the issues raised has been had. (People v. Hill, 39 Ill.2d 61; People v. Collins, 39 Ill.2d 286; People v. Ashley, 34 Ill.2d 402; People v. Hamby, 32 Ill.2d 291; Ciucci v. People, 21 Ill.2d 81; People v. Dolgin, 6 Ill.2d 109; People v. Jennings, 411 Ill.21.) Where review has once been had by a writ of error, including presentation of a bill of exceptions, any claim which might have been raised, but was not, is considered waived. (People v. Ashley, 34 Ill.2d 402; People v. Hamby, 32 Ill.2d 291; Ciucci v. People, 21 Ill.2d 81; People v. Dolgin, 6 Ill. 2d 109.) It is only where application of this salutary principle would be manifestly inconsistent with concepts of fundamental fairness that we have relaxed this rule. People v. Keagle, 37 Ill.2d 96; People v. Hamby, 32 Ill. 2d 291; People v. Williams, 36 Ill.2d 194."

The defendant argues that his Post-Conviction Petition should not be barred by the doctrine of res judicata because allegedly the Supreme Court relied upon erroneous facts in affirming the defendant's conviction in his direct appeal. (People v. Mims, 42 Ill.2d 441, 248 N.E.2d 92.) Specifically the defendant maintains that the Supreme Court relied upon two erroneous facts in the direct appeal.

First, defendant alleges that the Supreme Court was in error when it stated that the "defendant was represented by two privately retained attorneys when his plea of guilty was entered." To support this allegation defendant relies upon his own affidavit as well as the affidavits of his mother and aunt. An examination of the record, however, belies defendant's contention and this Court is of the opinion that the Supreme Court was correct in stating that "defendant was represented by two privately retained attorneys when his plea of guilty was entered." People v. Mims, 42 Ill.2d 441, 442, 248 N.E.2d 92, 93.

Secondly, the defendant argues that the Supreme Court, in

determining that the trial court's interrogation of defendant prior to acceptance of his change of plea met constitutional standards mistakenly viewed defendant "as being of average stability and mentality." Defendant's argument is better understood when considered in conjunction with the Supreme Court's determination on direct appeal concerning the change of plea proceedings:

> "The defendant was represented by two privately retained attorneys when his plea of guilty was entered. When the motion for leave to withdraw his plea of not guilty and to plead guilty to the charge of murder was presented, one of the defendant's attorneys described the advice that the attorneys had given the defendant as to the possible consequences of that plea, and said that after receiving that advice the defendant had stated that he still wished to plead guilty. In response to the trial judge's inquiry the defendant said that he understood that his plea of guilty waived his right to a jury trial. The judge then advised him of the possible penalties, and asked the defendant if he still persisted in his plea of guilty. The defendant answered 'Yes '.
>
> "The court then accepted the plea and inquired, 'What are the facts?' In the presence of the defendant the assistant State's Attorney stated what the testimony of the prosecution's witnesses would be, and the defendant's attorney stipulated to those facts, which showed that the deceased had been beaten and kicked to death in the course of a robbery by the defendant and another. The deceased's watch and his wallet were found on the defendant when he was arrested, and he confessed to the crime. The trial judge then entered judgment on the plea and imposed sentence.
>
> "Although the possible sentences were twice described to the defendant, and he stated he understood that he was waiving a jury trial, <u>his present counsel asserts that a more extensive interrogation should have been undertaken since the trial judge must have been aware of defendant's 'history of maladjustment and low education.'</u> The record shows that an examination of the defendant by the Behavior Clinic of the Criminal Court of Cook County had been ordered, but it does not show the results of that examination. The conclusion that we reached in <u>People v. Locke</u>, 18 Ill. 2d 471, 475, disposes of this contention. There we held that counsel's assertion that the defendant was of low mentality, coupled with the fact that a report

> from the Behavior Clinic had been ordered, did not establish a lack of competence to plead guilty." (Emphasis supplied) People v. Mims, 42 Ill. 2d 441, 442-43, 248 N.E.2d 92, 93-94.

Defendant now argues that the Supreme Court viewed him as being of average stability and mentality at the time of his plea, absent any positive evidence to the contrary. He further argues that the amended Post-Conviction Petition and supporting affidavits set forth unequivocal evidence of defendant's "severe mental instability and extraordinary low mentality" which controverts the Supreme Court's prior assumption. We disagree.

The report of the Behavior Clinic alluded to in the Supreme Court opinion on direct appeal was made part of the record before the trial judge who considered defendant's Post-Conviction Petition and is before this Court on appeal. The record reflects that there were in fact two Behavior Clinic examination reports prepared by Dr. William H. Haines, Director of the Behavior Clinic of the Criminal Court of Cook County.

In both of these reports, made shortly before defendant changed his plea, Dr. Haines concluded that defendant "knows the nature of the charge and is able to cooperate with his counsel." Moreover, the trial judge who presided at defendant's change of plea proceedings was firmly convinced as to defendant's competency as evidenced by his statement that:

> "I think that the time that's important here is the time when he (defendant) appeared before me in the criminal court. At that time there was no question about his mental capacity, about the fact that he understood what he was doing and understood what he had done. That was my opinion, based on talking to him, on the report of the doctor (Dr.William H. Haines)."

Defendant places great reliance on the conclusions of the mental and physical examination of defendant made by the Illinois Juvenile Research Institute in 1951, when defendant was approximately 10 years old. We have examined the report of this

examination and are of the opinion that inasmuch as this examination was conducted 11 years prior to defendant's change of plea proceedings, it is so remote and inconclusive as to be of little probative value. (See People v. Southwood, 49 Ill.2d 228, 274 N.E.2d 41.)

The Supreme Court held on direct appeal and the record establishes, that the trial court's interrogation of defendant prior to acceptance of his change of plea met constitutional standards. It is our opinion that these circumstances do not require that the application of the doctrine of res judicata be relaxed.

Defendant next argues that his change of plea to guilty was coerced in that his attorney told him that unless he did so the attorney would not represent him. On direct appeal, the Supreme Court considered this argument and stated:

> "The defendant has also attacked the judgment entered on his plea of guilty in a post-conviction petition in which he alleged that he pleaded guilty because his retained attorneys told him that unless he did so they would not represent him.... That proceeding is now pending in the circuit court, and all issues concerning the alleged coercion under which the defendant entered his plea will there be explored." (People v. Mims, 42 Ill.2d 441, 444-45, 248 N.E. 2d 92, 94.)

The trial judge, who also presided at defendant's change of plea proceedings and therefore had a personal opportunity to observe the defendant, after having reviewed the post-conviction pleadings and having heard the arguments of counsel concerning the "alleged coercion under which the defendant entered his plea" was of the opinion that these contentions were without merit as evidenced by his sustaining the People's motion to dismiss defendant's Post-Conviction Petition without an evidentiary hearing. This Court is of the opinion that from the record itself there is no doubt that defendant's change of plea was voluntary and that he

was not coerced. Indeed, it would seem incredible that any fact-finder would believe the defendant if he now testified in support of his allegation concerning the alleged coercion, and his testimony would be of little, if any, value at an evidentiary hearing. We are of the opinion that defendant's plea of guilty was made knowingly, understandingly and voluntarily.

Defendant also seeks to challenge the voluntariness of his change of plea in view of the alleged "coercive presence of his illegally obtained confession." However, we believe that this contention is without merit. As the Supreme Court stated in People v. Phelps, 51 Ill.2d 35, 38, 280 N.E.2d 203, 204:

> "Likewise, that petitioner may have been motivated (to plead guilty) by his coerced confession does not invalidate his otherwise knowing and intelligent plea of guilty (People v. Sephus, 46 Ill.2d 130; McMann v. Richardson, 397 U.S. 759, 25 L.Ed. 2d 763, 90 S.Ct. 1441), since that plea represented a voluntary and intelligent choice of the alternatives available to him. Brady v. United States, 397 U.S. 742, 25 L.Ed. 2d 747, 90 S.Ct. 1463; McMann; North Carolina v. Alford, 400 U.S. 25, 27 L.Ed. 2d 162, 91 S.Ct. 160."

Finally, defendant argues that he was denied the effective and adequate representation of counsel in the trial court proceedings. It is clearly evident that this contention could have been raised on defendant's original writ of error. As we have previously stated where a review has been had, any claim which there might have been raised, but was not, is considered waived. (See People v. Weaver, 45 Ill.2d 136, 256 N.E.2d 816.) Under the circumstances of this case, we can perceive no reason for relaxing this rule. In view of the fact that this contention was not raised on the direct appeal to the Supreme Court, it is deemed waived and may not be presented now.

For these reasons the judgment of the circuit court dismissing defendant's amended Post-Conviction Petition is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ. concur.

10 I.A.3/147

NO. 57078

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| PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, | ) | APPEAL FROM CIRCUIT COURT COOK COUNTY |
| vs. | ) | |
| WILEY PINKLEY, Petitioner-Appellant. | ) | HONORABLE HERBERT C. PASCHEN, PRESIDING. |

PER CURIAM:

Wiley Pinkley, hereinafter "petitioner," in March of 1966 entered pleas of guilty to four indictments charging him, in respect of four separate transactions, with armed robbery, rape, rape and armed robbery, and armed robbery and attempt murder. He was sentenced to terms of 50 to 100 years in the penitentiary on each of the rape and armed robbery charges and to a term of 19 to 20 years on the attempt murder charge, all terms to run concurrently. The instant pro se "amended post-conviction" petition (No. 2046) was filed pursuant to the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1969, ch. 38, par. 122-1 et seq.), after which counsel appointed for petitioner filed another "amended post-conviction petition" (amended No. 2046), supported by affidavits. After a hearing the petition was dismissed. Petitioner appealed the dismissal to the Illinois Supreme Court which subsequently transferred the cause to this court.

The record discloses that after an initial pro se post-conviction petition (No. 1480) had been filed and dismissed without an evidentiary hearing, petitioner filed the instant "amended post-conviction" petition and his counsel filed the instant "amended post-conviction petition," the latter two of which alleged that petitioner had been promised by the State a sentence of no more than 20 years in the penitentiary if he entered pleas of guilty, and further that his trial counsel was incompetent in that he did not adequately advise and represent petitioner prior to the entry of the pleas of guilty. It

further appears from the record that an affidavit was given by the prosecutor in charge of the trial, wherein he stated that an offer of a sentence of 50 to 100 years was made to defense counsel if petitioner would plead guilty; that no other offer was made nor any plea bargaining, or the like, engaged in; and that defense counsel left the room, returned, and with a "shrug" stated, "Guess what, he'll take it." A State's motion to dismiss petition No. 2046 without an evidentiary hearing was denied; the State's motion was accompanied by, inter alia, an offical statement of the facts underlying the charges contained in the indictments and petitioner's past criminal record, and the transcript of proceedings at the change of plea proceeding.

Petitioner testified at the hearing on the petition that he saw his trial counsel, Thomas Farrell, only once, which was immediately prior to the entry of the pleas when he was in the bullpen behind the courtroom; that he was told by counsel, after counsel had a conference with the assistant state's attorney, that if he pleaded guilty he would receive no more than a 20 year sentence; that he did not agree to a sentence of 50 to 100 years; that if he knew that he would be sentenced to terms of 50 to 100 years he would not have pleaded guilty; that counsel did not question him as to the facts underlying the charges in the indictment; and that he was told that there were four indictments pending against him and he could get a "big sentence."

Assistant public defender Farrell testified that he conferred with petitioner on three occasions, with cell bars between them; that on the first occasion, immediately after arraignment, petitioner broached the subject of making a deal with the State; that petitioner stated to counsel that he would take the 50 to 100 year sentence as long as he could be back with his family some day; that the witness felt the

State's offer was high; that the witness was familiar with the facts underlying the charges contained in the indictments, especially as to the attempt murder-armed robbery indictment, although he did not personally investigate the facts; that he was surprised that the petitioner accepted the offer; that he did not recall how long he spoke to the petitioner at the time he related the State's offer; and that he knew that he had a very difficult case to try, if it went to trial. The witness also testified that he explained to petitioner that he would be eligible for parole in about 20 years if he accepted the 50 to 100 year sentence; that he was ready to go to trial on the armed robbery-attempt murder indictment; that he was unhappy with the term of years recommended by the State; and that he did not recall making the statement, "Guess what, he'll take it", but he may have.

In denying the petition, the court specifically noted that the case involved the commission of four vicious crimes and that the petitioner had a poor criminal record.

Petitioner contends that he was denied the right to the effective assistance of counsel before entering his pleas of guilty. We disagree.

This matter is essentially one of the credibility of the petitioner vis-a-vis that of the assistant public defender who represented him at and prior to the entry of the pleas of guilty. People v. Bowers, 47 Ill. 2d 585, 268 N.E. 2d 13.

As to whether counsel interviewed witnesses or independently investigated the facts underlying the charges, such were matters of weight and credibility for the court, as was the question of the number of times counsel visited the petitioner. People v. Bowers, supra.

It is doubtful that counsel was required in the instant case to bargain for a lesser term of years than that initially offered. It does not appear that petitioner objected to the term of years offered, and his acceptance thereof is consistent with Farrell's testimony that petitioner instigated the idea of

a negotiated plea, that petitioner stated that he would accept it as long as he could eventually get back with his family, and that he had a past criminal record.

The fact that counsel did not remember the length of time that he spoke to petitioner at the time he related the State's offer to him, in light of the fact that this was the only case in which counsel had ever entered a plea of guilty with a sentence of 50 to 100 years, does raise some question, but that, of itself, does not constitute incompetency.

In light of the entire record, it does not appear that the petitioner sustained his burden of showing he was incompetently represented by counsel or that he was the victim of a broken promise as to length of sentence. People v. Alden, 15 Ill. 2d 498, 155 N.E. 2d 617.

Finally, the record shows that petitioner had five prior convictions, including one felony conviction, all dating from 1944 through 1955. It also shows, as the court in the post-conviction hearing stated, that four of the instant crimes committed were of a particularly vile and violent nature. The sentences imposed upon petitioner were not excessive.

The cases cited by petitioner are not in point. See Boykin v. Alabama, 395 U.S. 238; United States v. Wade, 388 U.S. 218; McMann v. Richardson, 397 U.S. 759; People v. Whitfield, 40 Ill. 2d 308, 239 N.E. 2d 850; People v. Edmonds, 47 Ill. 2d 574, 268 N.E. 2d 5; North Carolina v. Alford, 400 U.S. 25.

For these reasons the order is affirmed.

Order affirmed.

Publish abstract only.

No. 56171

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. |
| vs. | ) | |
| CARL HARRIS, Defendant-Appellant. | ) | HONORABLE SAUL A. EPTON, PRESIDING. |

PER CURIAM (First District, Third Division):

Carl Harris, hereafter called defendant, was charged with armed robbery and aggravated battery in violation of section 18-2 and section 12-4 of the Criminal Code. (Ill.Rev.Stat. 1969, ch.38, par.18-2, par.12-4.) After a jury trial, the defendant was found guilty and sentenced to concurrent terms of five to ten years on each charge. On appeal, the defendant argues that he was improperly sentenced for both armed robbery and aggravated battery since they arose out of a single occurrence and that his sentence is excessive.

The victim, Mr. James Loving, testified that on November 20, 1970, he was at home watching television. He is a man 58 years of age. Mr. Bolden, whom Loving had previously known, came to the door and was admitted. Several minutes later, the defendant came to the door and was admitted as a friend of Bolden's. As the defendant entered, Bolden hit Mr. Loving in the stomach and said, "Where is the money?" Mr. Loving said he had no money and was then tied up and severly beaten in an attempt to locate his money. Mr. Loving's dog was killed by the intruders. The defendant searched Mr. Loving's drawers and struck him with a belt which he had wrapped around his hand. Bolden produced a knife and threatened to kill Mr. Loving. Eleven dollars was taken in the robbery. Police officers entered the apartment and apprehended both men as they attempted to escape. Mr. Loving suffered a broken hand and various other injuries as a result of the beating.

Barry Costello and Louis Moisan, two Chicago police officers, testified that on November 20, 1970, they responded to a call and went to Mr. Loving's home. As they entered Mr. Loving's

apartment, they observed the defendant and Bolden standing over Mr. Loving, who was tied up and lying on the floor, badly beaten. Mr. Loving was lying next to his dog, which had been killed. Bolden had a knife in his hand. As the officers pulled their guns, Bolden ran toward the front door and the defendant ran toward the rear door. Both men were apprehended and $11 was found in the defendant's pocket.

Carl Harris, the defendant, testified that he accompanied his friend, Melvin Bolden, to Mr. Loving's apartment on November 20, 1970. They arrived together and had a glass of wine with Mr. Loving. Loving wanted more to drink and gave the defendant five dollars to purchase more liquor. Bolden and Loving began to argue and a fight developed. Bolden then tied Mr. Loving up and beat him. The defendant testified that he was trying to untie Loving when the police entered. He denied striking or robbing Mr. Loving. He also denied any knowledge of how Mr. Loving's dog died.

The defendant's first contention is that the trial court improperly sentenced him for both aggravated battery and armed robbery because both offenses arose out of the same course of conduct. A defendant cannot be sentenced for two offenses if each offense arises from the same act. (People v. Stewart, 45 Ill.2d 310, 259 N.E.2d 24; People v. Barnett, 7 Ill.App.3d 185, 287 N.E. 2d 247.) However, where the facts of the case demonstrate that separate and distinct conduct resulted in the commission of more than one offense, concurrent sentences are proper. People v. Baker, 114 Ill.App.2d 450, 252 N.E.2d 693.

In People v. Miller, 2 Ill.App.3d 206, 276 N.E.2d 395, we considered a case similar to the case at bar. There the defendant was found guilty and sentenced for both armed robbery and aggravated battery. In reversing the aggravated battery conviction, we concluded that the acts constituting aggravated battery were part of the armed robbery and were not independently motivated from the offense of armed robbery. Concurrent sentences were, therefore, improper.

In the case at bar, however, the acts constituting aggravated battery were clearly part of the armed robbery. When Mr. Loving was first struck, he was asked, "Where is the money?" The beating continued as a means to make Mr. Loving disclose the whereabouts of his funds. Under these circumstances, the acts constituting aggravated battery were not independently motivated from the offense of armed robbery and it was improper to impose concurrent sentences. The sentence imposed for aggravated battery, the lesser offense, is therefore vacated.

The defendant's second argument is that his sentence is excessive and should be reduced. The power to reduce sentences should be exercised with care and only where it is manifest from the record that the sentence is excessive. (People v. Conway, 3 Ill.App.3d 69, 278 N.E.2d 852.) In the case at bar, the defendant was convicted of armed robbery in violation of section 18-2 of the Criminal Code, the penalty for which was an indeterminate term in the penitentiary of not less than two years. (Ill.Rev.Stat. 1969, ch.38, par.18-2.) The defendant had a criminal record of nine misdemeanor convictions. The sentence imposed in this case is within the statutory limits and a review of the facts and of the defendant's prior record demonstrate that the trial judge imposed a proper sentence.

For the foregoing reasons, the judgment entered on the charge of armed robbery is affirmed and the judgment entered on the charge of aggravated battery is vacated.

Judgment affirmed in part;
judgment vacated in part.

Per curiam.

56376

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|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |
| | ) | |
| FRANK McCALL, | ) | HONORABLE |
| | ) | EARL J. NEAL, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant Frank McCall was charged with criminal trespass to a vehicle. (Ill.Rev.Stat. 1969, ch. 38, par. 21-2.) He was found guilty in a bench trial and sentenced to six months in the House of Correction. He appeals.

Defendant makes two contentions: (1) He was not proved guilty beyond a reasonable doubt; and (2) his original arrest was unlawful.

Marie Myrick testified: She was the owner of an automobile, light green with a black top, license number CU1721, serial number 136379K427906, which had been stolen from the street across from her house at 7040 Cregier in the City of Chicago. She had not given anyone permission to take, use or drive her car from that location. She next saw her car about 27 or 28 days later at the police station. When she first saw the car at the police station, it was dark. Subsequently she examined it and found that her radio and air conditioner were about to fall out and her battery was just sitting in the car and she had five flat tires later "from Wednesday to that Saturday."

Police Officer McGreal testified: He had arrested the defendant at 10:30 P.M. on June 14, 1971, at 1153 East 72nd Street in Chicago, Illinois. Defendant was seated in the auto mentioned by the complainant. The car was facing west in the

eastbound lanes about four feet from the curb. The witness checked the vehicle by way of the serial number and discovered it had been reported stolen. Upon discovering that the car was stolen, the witness asked defendant if he had identification for the auto and defendant said he did not. The witness informed defendant that he was under arrest and that the auto was stolen. The witness examined the vehicle; there were dents and scratches on the body; no heavy damage was apparent. He did not notice anything unusual about the interior parts of the car.

The witness testified that defendant stated that he was waiting for a friend; that was all.

Defendant Frank McCall testified: On June 14, 1971, he was in a car which was parked at approximately 1153 East 72nd Street. He was not driving it nor had he been driving it. He was sitting in the car waiting for a friend to come down from the second floor. The friend lived at 72nd Street and Woodlawn. Defendant had been in the car about ten minutes. He had got in the car on 69th and Stony. He did not know that the car was stolen. There was nothing about the car that would lead him to believe that it was stolen; the fellow that picked him up usually had a car, so defendant figured it was his. Defendant asked him to take defendant home. The friend said he would, but he had to make a stop first. When the officer pulled up, he (defendant) slid over to the driver's seat as he thought the officer was asking him to move the car. The officer asked him for his license. Defendant told him he didn't have it and that the car didn't belong to him; that the person who was driving was upstairs and would be back in about five or ten minutes.

The state and the defense stipulated that the car was missing since May 18, the arrest was made on June 14, and that the complaining witness' keys were in the ignition of the car at the time of the arrest.

Section 21-2 of the Criminal Code (Ill.Rev.Stat. 1969, ch. 38, par. 21-2) provides:

> Whoever knowingly and without authority enters any vehicle *** of another without his consent shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

In People v. Owes, 5 Ill.App.3d 936, 284 N.E.2d 465, we reversed a conviction under this statute where the evidence failed to show that there was any reasonable indication to defendants at the time they entered the car that the car had been stolen or was being driven by a person not lawfully in possession, or that defendants knew that the car did not belong to those who invited them for a ride. Nor was there any evidence introduced that defendants noticed any damage to the car that indicated it had been stolen.

The opinion stated at pages 938-939:

> Defendants maintain that the State failed to prove beyond a reasonable doubt all the essential elements of the crime. They contend that the State has not proved that defendants "knowingly" entered a vehicle without the owner's consent. Criminal knowledge is as much an element of criminal trespass to a vehicle as it is of theft. (People v. Chandler, 84 Ill. App.2d 231, 236, 228 N.E.2d 588.) As defined by the statute, the offense prohibits the entry of a vehicle by a person knowing he does not have authority to enter. There is nothing in the statute which prohibits a person who has made an innocent entry into the vehicle from remaining therein after he discovers it has been stolen.
>
> *** In the absence of a showing beyond a reasonable doubt that defendants had knowledge they were entering a vehicle without the owner's consent, the State has failed to sustain its burden of proof.

and concluded that "a continuing unlawful trespass is not proscribed by the statute when there has been an initial innocent entry."

Here, the evidence as set forth above is equally weak and is not sufficient to show, beyond a reasonable doubt, that

defendant knew at the time he entered the car that it was stolen. Thus, the state failed to sustain its burden of proof as to an essential element of the crime charged.

Because of this conclusion, we need not consider defendant's second contention.

The judgment of the trial court is reversed.

JUDGMENT REVERSED.

(Publish abstract only.)

10 I.A.3 152

No. 57787

| | | |
|---|---|---|
| AGNES MYSTEK, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| Plaintiff-Appellee, | ) | COOK COUNTY. |
| | ) | |
| vs. | ) | |
| | ) | |
| HUMBERTO Q. DE LA ROSA, | ) | HONORABLE |
| | ) | JAMES A. GEROULIS, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (First District, Third Division):

This is an appeal from an order from the circuit court of Cook County denying defendant's petition under section 72 of the Civil Practice Act to vacate a default judgment. Ill.Rev. Stat. 1971, ch.110, par.72. On appeal the defendant argues (1) that the original complaint does not state a cause of action; (2) that the facts indicate that plaintiff had mistakenly identified the parties; and (3) that the defendant is entitled to section 72 relief.

Agnes Mystek, hereafter called plaintiff, filed suit against Humberto Q. De La Rosa, hereafter called defendant, for injuries received in a fall on defendant's premises. Defendant was served with process in 1968. Defendant did not retain counsel nor answer the complaint. In a letter dated October 13, 1971, counsel for plaintiff notified defendant that the case would be up for trial on October 28, 1971. Defendant claims that he did not receive said notice until November, 1971. The defendant did not appear at trial and a default judgment was entered in the amount of $12,500. Within thirty days after the judgment, defendant contacted counsel for plaintiff, who informed him of the default and of the fact that he best get a lawyer within thirty days if he wished to vacate the judgment. The defendant did, within the thirty days, retain an attorney who conferred with counsel for plaintiff and was informed that the thirty days would soon expire. On January 12, 1972, two and one-half months after the default, the defendant filed a petition to vacate under section 72 of the Civil Practice Act. The petition was

denied on February 9, 1972. On March 1, 1972, defendant filed an amended petition to vacate under section 72. An answer on the merits was filed by plaintiff. After several continuances, the amended petition was denied. The defendant appeals the denial of the amended petition.

Defendant's first two arguments, that the complaint is insufficient and that the parties were mistakenly identified, both go to the alleged meritorious defense. However, even if we assume that the defendant does have a meritorious defense, it does not follow that he is automatically entitled to section 72 relief. To be entitled to section 72 relief, a petitioner must allege and prove due diligence or excusable mistake. Failure to do so renders the petition insufficient as a matter of law. (Mehr v. Dunbar Builders Corp., 7 Ill.App.3d 881, 289 N.E.2d 25.) In the case at bar, the record shows that the defendant was first served with process in 1968. He did not hire counsel or answer the complaint for three years. The defendant was sent a letter by plaintiff's attorney dated October 13, 1971, notifying him that the case was coming up for trial October 28, 1971. The defendant claims he did not receive the letter until November, 1971. The defendant did not appear on the trial date and a default was entered. Within thirty days of the entry of the judgment, defendant contacted plaintiff's attorney, who advised him he had thirty days to retain an attorney and to set aside the judgment. The defendant did hire an attorney who conferred with counsel for plaintiff within the thirty day period. However, no motion to vacate was filed until January 12, 1972, two and one-half months after the default. These facts show a complete lack of diligence. The defendant had three years to answer the complaint and failed to do so. He did not appear for trial and, despite the fact that he had hired an attorney and knew he had only thirty days to vacate the order, did nothing for two and one-half months. Under all the circumstances, the trial judge properly denied defendant's section 72 petition.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

Per curiam.

57309

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|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Respondent-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |
| | ) | |
| RUSSELL SMITH, | ) | HONORABLE |
| | ) | JOSEPH A. POWER, |
| Petitioner-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Russell Smith (petitioner) was found guilty at a jury trial of the crime of murder and was sentenced to a term of 14 to 20 years. The conviction was affirmed on direct appeal to this court. People v. Smith, 118 Ill.App.2d 65, 254 N.E.2d 596. Petitioner subsequently filed a pro se petition for relief pursuant to the Illinois Post-Conviction Hearing Act alleging the violation of certain of his constitutional rights. Ill. Rev.Stat. 1971, ch. 38, pars. 122-1 et seq. On motion of the state, the petition was dismissed without an evidentiary hearing, and the petitioner appealed.

The public defender of Cook County was appointed counsel for petitioner on this appeal and has filed a motion for leave to withdraw as appellate counsel, supported by a brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, on the grounds that the appeal is without merit and could not possibly be successful. Petitioner was notified of the motion and was allowed six weeks' additional time to file any points he desired in support of the appeal. Ten weeks have now passed and petitioner has not responded.

The post-conviction petition alleged four grounds for relief: (1) that an alleged eyewitness to the homicide, Herman Hatch, was not listed on the list of prospective witnesses supplied by the state before the trial; (2) that the omission

of his name from the list constituted an improper suppression of evidence, since Hatch would have testified in corroboration of petitioner's account of the homicide; (3) that Negroes were excluded from the jury, which violated petitioner's right to be tried by his peers, since he was a Negro; and that (4) several police officers committed perjury at the trial by testifying to their dealings with petitioner, whereas petitioner had no dealings with them whatsoever, but only with a police officer who did not testify.

Attached to the petition was an affidavit by Herman Hatch to the effect that he observed the deceased "begin to fight with" the petitioner, that he observed the manner in which the petitioner stabbed the deceased, that he observed the deceased procure a shotgun, and that he was one of those who took the deceased to the hospital, where the police took his (affiant's) name and address.

An exhibit in the record reveals that counsel appointed for petitioner in the post-conviction proceedings consulted with petitioner prior to the hearing on the state's motion to dismiss, that he read the trial reports, and that he concluded the pro se petition did not require alteration or amendment. At the hearing on the motion to dismiss, the four points raised by petitioner were dealt with and the court determined that the matters raised either were barred by the doctrine of res judicata or did not present constitutional questions.

The first two questions raised, that of whether the failure to list the name of Herman Hatch on the list of witnesses was improper and whether that failure constituted an improper suppression of evidence favorable to the petitioner, were clearly barred by the doctrine of res judicata. Those matters could have been raised either at the trial or on the direct appeal, on which,

it may be added, petitioner filed a pro se brief and abstract in addition to that filed by his counsel and in which none of the points raised in the instant petition was raised. People v. Kamsler, 40 Ill.2d 532, 240 N.E.2d 590, cert. denied 394 U.S. 911, rehrg. denied 394 U.S. 967. The question of the selection of the jurors could likewise have been raised at the earlier proceedings and is barred by the doctrine of res judicata.

Petitioner filed no affidavit supporting the point raised as to the alleged perjury on the part of the police officers, nor were sufficient facts alleged to warrant a hearing thereon. People v. Evans, 37 Ill.2d 27, 224 N.E.2d 778.

The public defender, in his brief filed in support of the motion for leave to withdraw, states that the only matter which could be raised on appeal is whether petitioner received procedural due process at the post-conviction proceedings. A review of the record by this court in discharge of our duty under the mandate of the Anders case reveals that petitioner was, indeed, afforded procedural due process. Further, there is sufficient evidence to show that his court-appointed counsel for appeal complied with Supreme Court Rule 651 in his representation of the petitioner, in that he reviewed the trial record, interviewed the petitioner both personally and by mail, analyzed and considered the matters raised in the post-conviction petition, and presented the case to the court. Ill.Rev.Stat. 1971, ch. 110A, par. 651.

In light of the foregoing, it is evident that the prosecution of an appeal in this matter would be wholly frivolous and without merit. The public defender of Cook County is accordingly granted leave to withdraw as counsel for defendant and the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

(Publish abstract only.)

58049

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |
| | ) | |
| HAROLD HARRISON, | ) | HONORABLE |
| | ) | JOHN J. CROWLEY, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

In a bench trial, Harold Harrison, hereafter called defendant, and Anthony Harrison were convicted of battery, in violation of section 12-3 of the Criminal Code (Ill.Rev. Stat. 1971, ch. 38, par. 12-3). Defendant, who is the sole appellant, was sentenced to a term of six months in the House of Correction.

The public defender was appointed to represent defendant on appeal and he now moves for permission to withdraw as attorney of record. He has filed a brief in support of his motion pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396. A copy of the motion and the accompanying brief were mailed to defendant on November 13, 1972. Defendant was advised that he had until January 15, 1973, to file any points he might choose in support of his appeal. He has not responded.

In the public defender's motion to withdraw, he has stated that after reviewing the common law record and transcript of the proceedings, it was his belief that the only possible basis for an appeal would be: whether the defendant was proven guilty beyond a reasonable doubt.

The testimony adduced at trial follows: Robert Kwiatkowski, a Chicago police officer, testified that on June 16, 1972, at approximately 10:00 P.M., he was on routine patrol in the area of

2000 West North Avenue with his partner. He observed a group of young men fleeing from a tavern at 2007 W. North Avenue. Frank Depasquale came out of the tavern and asked the officers to stop those men because they had just robbed the tavern. Officer Kwiatkowski then placed defendant and Anthony Harrison under arrest.

Depasquale testified that he is a bartender in the tavern located at 2007 W. North Avenue, Chicago, Illinois. At approximately 9:30 P.M. on June 16, 1972, five men entered the tavern. He identified defendant and Anthony Harrison as two of those men. The five men began to knock people off bar stools and to take their wallets. At this time, Depasquale observed Anthony Harrison with his hand in Arthur Barness' pocket, attempting to take out a wallet. Depasquale tried to stop him by grabbing his arm, at which time Anthony Harrison began to hit Depasquale. Defendant then came up to Depasquale and struck him on the left side of his head in order to effectuate the release of Anthony Harrison. All five men then ran out of the tavern.

Anthony Harrison and defendant both testified that on June 16, 1972, they were inside the tavern in question; that immediately upon their entering, Anthony was propositioned by a prostitute and, after refusing her offer, he was struck by the bartender; that both men then left the tavern. They both denied having any part in a robbery and defendant denied hitting Depasquale.

We agree with the public defender that the argument that defendant was not proven guilty beyond a reasonable doubt is wholly frivolous. The trier of fact determines the credibility of witnesses and his decision will not be reversed unless the evidence is so unsatisfactory as to raise a reasonable doubt as

to the defendant's guilt. People v. Hoffman, 45 Ill.2d 221, 258 N.E.2d 326, cert. denied 400 U.S. 904. The above evidence amply supports the trial court's finding that defendant was proven guilty beyond a reasonable doubt.

We have made "a full examination of all the proceedings" as required by Anders, in addition to reviewing the brief filed by the public defender. We conclude that there are no legal points "arguable on their merits" and that the appeal is wholly frivolous. The public defender is therefore given leave to withdraw and the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

(Publish abstract only.)

55194

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| WILLIAM F. RYAN, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. |
| | ) | |
| v. | ) | |
| | ) | |
| JERRY G. WAGNER, | ) | HONORABLE WILLIAM J. McGAH, JR. Presiding. |
| | ) | |
| Defendant-Appellant. | ) | |

MR. JUSTICE EGAN delivered the opinion of the court:

The court entered a conditional default judgment on February 20, 1967, the return day, and a default order on March 9, 1967. The damages awarded on the personal injury complaint were $10,000, which was the exact amount of the ad damnum. The defendant later filed a petition under Section 72 of the Civil Practice Act. The petition alleged that after the defendant was served with summons he tendered it to his insurance carrier; before the return date the claim manager phoned the attorney for the plaintiff and discussed the possibility of settlement before the carrier referred the suit to outside counsel; the plaintiff's attorney agreed to a stipulation to extend the time to answer for 60 days; the attorney for the plaintiff said he would prepare and mail the stipulation with his special damages; a week before the return date the claim manager phoned the plaintiff's attorney, who was not in, spoke to a girl in the office and left his name and phone number; when he did not receive the stipulation, special damages or phone call by March 28, 1967, a stipulation was prepared and mailed to the plaintiff's attorney with a letter calling attention to the previous telephone conversation; the claim was diaried for April 20, 1967; the file "got off" the claim manager's diary and was not seen again until October 17, 1967, when a garnishment summons was received informing the

defendant or the carrier for the first time that a judgment had been entered.

No answer to the petition was filed. After a hearing on March 25, 1970, the court denied the petition.

The appellee has filed no brief in this court. The proposition that cases before this court should be decided on their merits has been expressed often. (Daley v. Jack's Tivoli Liquor Lounge, Inc., 118 Ill.App.2d 264, 254 N.E.2d 814; Lynch v. Wolverine, 126 Ill. App.2d 192, 261 N.E.2d 466.) However, this is not an inflexible rule. (Gibralter Corporation v. Flobudd Antiques, 131 Ill.App.2d 545, 269 N.E.2d 515.) The appellee has never sought an extension for filing a brief and did not appear for oral argument. In view of his complete lack of interest in this appeal we believe a pro forma reversal is appropriate. See Drovers National Bank v. City of Chicago, ___ Ill.App.3d ___, 273 N.E.2d 238.

The judgment of the circuit court is reversed and the cause remanded with instructions to enter an order granting the defendant a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

BURKE, P.J. and GOLDBERG, J. concur.

57065

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Respondent-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |
| | ) | |
| EDWARD HOGAN, | ) | HONORABLE |
| | ) | ROBERT L. HUNTER, |
| Petitioner-Appellant. | ) | PRESIDING. |

PER CURIAM (Second Division, First District):

The petitioner, Edward Hogan, was charged with the crime of murder. Initially, on arraignment, he pleaded not guilty. Subsequently, after a motion to suppress his confession was denied, he withdrew his plea of not guilty and entered a plea of guilty in May, 1963. He was sentenced to the Illinois State Penitentiary for a term of fourteen to eighteen years.

In November, 1966, the petitioner filed a pro se post-conviction petition alleging that his plea of guilty was coerced by the improper denial of the motion to suppress his confession. The petition was dismissed upon motion by the People. The Illinois Supreme Court reversed and remanded the dismissal of the petition holding that the petitioner did not receive the kind of representation to which he was entitled in the post-conviction proceedings, 44 Ill.2d 277, 255 N.E.2d 453. Upon remandment, a private attorney was appointed to represent the petitioner. On July 8, 1970, after several conferences with the petitioner, an amended petition accompanied by affidavit was filed alleging that the petitioner's plea of guilty was coerced by the improper denial of the motion to suppress. A transcript of the motion to suppress was also filed. The petition was denied without an evidentiary hearing and this appeal followed.

The petitioner's sole argument on appeal is that he was entitled to an evidentiary hearing on his post-conviction petition

because it alleged a substantial denial of his constitutional rights. In the trial court the defense did not request such a hearing. The defense attorney, who had conferred several times with the petitioner in great detail, stated that there were "no new facts" and that his only request was that "the court review the original transcript of the proceeding" to determine if there was a violation of the petitioner's rights. The transcript of the motion to suppress was admitted into evidence and the cause was continued to give the trial judge time to study the record. On the continued date, the trial judge stated that he had read the transcript and could find no basis for disturbing his prior order. The petition was denied. The defense does not now challenge the correctness of the trial court's ruling on the transcript, but argues only that the court was required to hold an evidentiary hearing.

Assuming, however, that the validity of the confession is in issue, the facts as shown by the transcript of the motion to suppress demonstrate that there was sufficient evidence upon which the trial court relied in ruling that his confession was voluntary. The court has often stated that at a motion to suppress, credibility of the witness is for the trial court to determine. People v. Wilson (1963), 29 Ill.2d 82, 193 N.E.2d 449. In the case at bar, the testimony of four police officers, two assistant state's attorneys, and a court reporter adequately established that the defendant's confession was voluntary. It cannot be said that the trial court's judgment was manifestly erroneous. Since the defendant's motion to suppress his confession was properly denied, it could not have led to a violation of his constitutional rights.

Where a petitioner fails to raise an issue in the trial court post-conviction proceedings, he cannot rely upon that argument in his appeal. People v. Turner (1970), 47 Ill.2d 7, 264 N.E. 2d 145; People v. Eldredge (1969), 41 Ill.2d 520, 244 N.E.2d 151.

Since the defendant in the case at bar stated in the trial court that he did not want a hearing on his petition, he cannot now argue that it was error not to hold such a hearing.

For the foregoing reasons, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

56574

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|---|---|---|
| CENTRAL NATIONAL BANK OF CHICAGO, as Trustee under Trust No. 16780, | ) | |
| Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. |
| vs. | ) | |
| VILLAGE OF HOFFMAN ESTATES, a body politic and corporate, | ) | |
| Defendant-Appellant, | ) | |
| CHARLES WEINRICH, et al., | ) | Hon. Herbert A. Ellis, Presiding. |
| Intervening Defendants. | ) | |

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Central National Bank of Chicago, not individually, but as trustee under a trust designated as No. 16780, (plaintiff), brought an action for declaratory judgment against Village of Hoffman Estates, a municipal corporation, (defendant), seeking to invalidate a zoning ordinance of defendant as applicable to real estate owned by plaintiff. The trial court granted the relief prayed, found the ordinance invalid in its application to plaintiff's property and directed issuance of necessary building permits to plaintiff. Defendant appeals.

Charles Weinrich and some 23 other persons (intervenors) obtained leave of court to intervene in the proceedings by virtue of a petition in which they alleged ownership of real estate in the vicinity of the subject property. Intervenors filed an answer to the complaint but have not filed notice of appeal.

Defendant urges that plaintiff has failed to overcome the presumption of validity of the zoning ordinance and has failed to show that the use it proposes for the property is

reasonable in view of the nature of the surrounding area. Defendant contends that the proposed use would be harmful to the surrounding area and would be adverse to the public interest. In addition, it contends that the ordinance does not deprive plaintiff of the fair value of its property. Plaintiff responds with the argument that the evidence clearly establishes the zoning classification to be unreasonable, arbitrary and confiscatory and that the judgment appealed from is fully sustained by the evidence. Plaintiff also contends that the present zoning of the subject property was imposed by defendant in a discriminatory manner.

The subject property is a rectangular tract of vacant real estate located in Palatine Township in the north portion of defendant village containing approximately 78 acres. It has a frontage of 1340 feet on Bradwell Road, which forms its north boundary, and similar frontage upon Palatine Road to the south. The western boundary is at the limit of defendant village and the property extends some 2000 feet in the north-south direction. Immediately to the east is a vacant tract of some 72 acres. This property has been subdivided into 114 lots. There are 113 lots in its western portion. The entire eastern portion comprises lot 114.

On June 24, 1964, defendant adopted an ordinance which zoned the subject property as B-2 or Central Business District use. The 41 acre portion of the tract next to the east, comprising 113 lots, was zoned R-4, which provided for multifamily apartment dwellings. The eastern portion of the tract, comprising lot 114, and consisting of some 31 acres, was zoned R-2 which provided for single family use under defendant's ordinances. This same ordinance subdivided the entire tract as above noted.

In January of 1970, plaintiff purchased the subject property for $511,000 or approximately $6500 per acre. Shortly thereafter, plaintiff petitioned defendant to rezone the property to permit a Residential Planned Development, the details of which will later be described. This request was denied by defendant. In lieu thereof, defendant rezoned the entire subject property from B-2 to R-2 single family residential except for a small rectangular portion in the southeast corner of the property, comprising almost ten acres, which was permitted to remain under the B-2 classification.

We will next note the present zoning in the vicinity of the subject property. Immediately to the north is an area within the Village of Inverness zoned A-1. This provides for single family residences on lots of 40,000 square feet. Farther to the east, and thus northeast of the subject property, also directly to the east of the subdivided area east of the subject property, the real estate is in the unincorporated area of Cook County under an R-2 classification. This zoning also provides for single family residences on lots of 40,000 square feet. A small portion of this area is zoned R-3 under Cook County Zoning. This permits single family homes on lots with a minimum area of 20,000 square feet. South of this unincorporated area, and thus to the south of the entire subject property and the tract adjacent to the east, the area is within defendant village and it is subdivided and zoned R-2 which provides for single family residences upon lots of 10,000 square feet. To the southeast of the subject property there is another unincorporated area zoned R-1 under the Cook County ordinance or single family residential on lots with minimum area of five acres. To the southwest and west of the subject property, zoning is also in the

R-1 designation of Cook County with similar single family residential zoning in the Village of South Barrington. To the northwest the area is zoned for single family residential uses; either A-1 by the Village of Inverness or R-2 by Cook County.

Regarding actual land uses in the vicinity of the subject property, there is a parcel of land containing approximately 120 acres immediately north of Bradwell Road. It is owned by one of the intervenors. This ownership extends some 660 feet west of the subject property. It is improved with a five room farm house and a number of other farm buildings. Also it has a new single family residence built some two years ago. The remainder of this tract is vacant. The owner of the property testified that, when he built this new residence, he knew that the subject property was entirely zoned for B-2 or Central Business District uses. Twenty acres of vacant property a half mile east on Bradwell Road were recently sold to a local school board.

Immediately to the west of the subject property is a parcel of 80 acres owned by another intervenor. This property is used primarily for farming but it also contains a residential building and some small improvements. The property extends from Bradwell Road south to Palatine Road. The residence fronts upon Bradwell Road but is set back several hundred feet from the property boundary. It is in the extreme western portion of the property, apparently some 800 feet west of the subject property. This property is not located within the defendant village.

Land to the south of the subject property across Palatine Road is entirely vacant. There is one parcel of property some

one half to three quarters of a mile to the southeast of the subject property comprising two acres owned by another of the intervenors which is improved with a single family residence.

Another intervenor owns a parcel north and to the west of the subject property consisting of 20 acres which is improved with a residential structure occupied by the owner. This area has been subdivided into 15 lots of one acre each. Several single family homes have been constructed on these lots and sold. This parcel is 650 or 700 feet northwest of the subject property and the improvements have been set back approximately 68 feet to the north of Bradwell Road.

To the northeast of the subject property the land is largely vacant. However, there is a piece of property some three quarters of a mile northeast of the subject property which is also improved with a single family residence. It is also owned by one of the intervenors. Other than these described uses, the area in the vicinity of the subject property is vacant and used primarily for farming.

The property immediately to the east of the subject property is presently vacant. The eastern portion thereof has been referred to by counsel for both sides as a "proposed golf course." However, there is no evidence that the property has ever been actually devoted to this use. No ordinance of defendant requires its use for that purpose. On the contrary, this large lot is zoned R-2 under the applicable ordinances. It may be used for single family dwellings upon lots not less than 10,000 square feet in area with a floor area ratio not to exceed .3. In addition, it may be used for a public library, fire station, school (public or noncommercial), parks and playgrounds, churches, golf

course, greenhouses and conservatories, as well as private swimming pools and tennis courts or tool houses, sheds and similar buildings for the storage of domestic supplies, etc.

Defendant caused to be prepared, and the court received in evidence, a colored aerial photograph which depicts actual land uses in the area. This exhibit has an acetate overlay which shows existing zoning. It reflects a considerable number of single family dwellings erected far to the east of the subject property, particularly in the Village of Inverness. However, as the eye proceeds in a westerly direction, we find graphic verification of the fact above stated, that the great bulk of land in the immediate area of the subject property, and the abutting parcel to the east, is vacant and unused.

Plaintiff obtained surveys of the subject site from a number of points of view, such as the nature of the soil with reference to stability, vehicular traffic in the area, and population changes and trends. As a result, plaintiff evolved a self-contained multiple dwelling project which was the basis of the petition for classification of the subject property under a Residential Planned Development use.

The subject property has been described as rolling and undulating. The highest point of the parcel is 39 feet higher than the lowest point. Other than an unstable marshy area toward the northeast of the property, expert opinion was that the property is suitable from the point of view of soil composition for erection of the proposed project. Defendant offered evidence on this subject. A qualified civil engineer testified that he examined the subject property and that he made test borings into the soil by means of a hand-operated tool. He expressed the opinion that

from the standpoint of building construction, the subject property is suitable for single family residential use. In his opinion, the subject property was comparable in this respect to other areas in its immediate vicinity, which had been improved for single family residential use. This witness did not rebut plaintiff's evidence on this subject as to suitability of the site for the proposed project.

Plaintiff proposes to erect 28 separate apartment buildings in scattered sites upon the property. One type of building would contain 40 units with 16 one bedroom and 24 two bedroom apartments. The second type would have 32 one bedroom and 16 two bedroom units, being a total of 48 apartments in each. The third type would have 56 units with 32 containing one bedroom each and 24 with two bedrooms each. Each one bedroom apartment approximates 770 square feet and the two bedroom units would each contain 1088 square feet. There would be a minimum setback of all buildings of 35 feet from the boundaries of the development. Minimum distance between buildings would be at least 70 feet. The residential buildings would be no more than 35 feet in height and would consist of no more than four stories. This height requirement is within the provisions of the applicable village ordinances.

The project would contain a total number of 1352 dwelling units with 816 one bedroom units and 536 two bedroom units. All contemplated buildings would cover 14.5% of the entire site and there would be permanent open space comprising 51.1%. The floor area ratio would be .485. Approximately 26.8 acres of the total site would be used for parking and paved areas. There would be access by automobile from Bradwell Road at the north and also from Palatine Road at the south. The site would be designed to

provide for circulation of traffic, and motor vehicle access would be had through double lanes. There would be 1.6 parking spaces for each dwelling unit arranged and distributed to provide easy access.

Each of the residential buildings would have exterior walls of masonry and interior of so-called ordinary construction with wooden joists and trim. Each would have two stairways and an elevator and each apartment would have an exterior balcony. A market analyst and expert in real estate research recommended rentals from $175 to $195 per month for the one bedroom units and $225 to $275 per month for the two bedroom units. There is opinion testimony that, including all of these proposed improvements, the entire project would cost approximately $28,000,000. The extreme southeast corner of the subject property, a square area comprising approximately eight acres, would be devoted to commercial uses. The installations there are contemplated as serving the needs of persons residing upon the project. The usual neighborhood type of services would be offered such as a supermarket, bank, florist, hardware store, laundry facilities and a medical-dental clinic.

Plaintiff also presented the testimony of an expert engineer associated with a firm of land planners and architects. This witness had examined the property and prepared a site plan locating the proposed improvements with reference to buildings, parking, traffic circulation and access to adjacent roads. He testified that the site would also lend itself to erection of some 200 single family residences but that this would require a grid system of roads, a considerable amount of grading and perhaps the use of retaining walls. The proposed improvements were located pursuant to information as to soil composition and

stability ascertained from test borings made by a civil engineer specializing in foundation engineering.

Plaintiff presented the testimony of a duly licensed architect and designer in connection with the details of construction of the residential and other buildings upon the project. In addition, a civil engineer made a feasibility study of the site in connection with providing sufficient water supplies, sanitary sewers and provision for proper drainage of storm water. This witness testified that no source of water was presently available but that this could be supplied by the installation of a drilled well upon the site together with a pump house and other necessary equipment. In addition, necessary sewer and water mains would have to be supplied as no sanitary or water outlets are presently available at the subject property. The closest municipal water mains are about one-half mile south.

Plaintiff also called a traffic expert who made various counts of the volume of vehicular traffic in the vicinity of the site. There is no public transportation closer than some three miles from the subject property. The witness estimated that approximately 612 vehicles would leave the completed project by way of Bradwell Road every morning and would return at night, and that 1641 vehicles would enter and leave during rush hours by way of Palatine Road. In the opinion of the expert, this left a margin of some additional 1400 automobiles that could leave and enter from Bradwell Road and some 560 additional automobiles that could use Palatine Road. The witness expressed the opinion that the present traffic capacity of both Bradwell Road and Palatine Road would be more than sufficient to handle the traffic increase which would be generated by completion and

occupancy of the proposed project. Defendant offered no contrary evidence. Defendant urges generally, however, that the traffic increase would "change the essential character of the area."

Plaintiff also called an expert in real estate research who had made an analysis of the proposed development from the point of view of population characteristics and trends in the area of the six townships surrounding the subject property. He estimated that, according to census figures, this area had a population of 24,273 in 1950 which increased in 1970 to 168,420. He projected an estimate of a population of 255,850 for the year 1980. From 1960 to 1969, 24% of the total dwelling units in the entire area were contained in multifamily units. He also estimated that during this same period of time, 40% of the housing authorized by building permits in Palatine Township, where the subject property is located, was the multifamily type. The expert testified that within this six township area there were 14 separate multifamily rental developments, most of which were relatively new. This expert made the above suggestion to the developer regarding rentals for the proposed project. In his opinion, there was a need for multifamily housing in the area. The closest such development is about two-and-one-half miles from the subject property.

Plaintiff also called a real estate appraiser. He valued the subject property under its present R-2 zoning classification at $6000 per acre. He estimated that the property would be worth from $15,000 to $20,000 per acre if used for a planned multifamily apartment development. This range of valuation would depend upon the density of dwelling units per acre. The expert testified that he was not familiar with the density of

use in the proposed development. He had no opinion regarding the value of the subject property if rezoned in accordance with the proposed Planned Development.

Plaintiff also called an experienced planner with considerable experience and expert qualifications in city development and planning. He described the subject property and the surrounding zoning and actual uses. He also gave a description of the proposed Planned Development. This witness testified that in his opinion the highest and best use of the property was in accordance with the proposed project. In his opinion, this development would best promote the health, safety and welfare of the general public. He also testified that the proposed development would not have a deleterious effect on any of the areas surrounding the subject property.

This witness had also prepared, and the trial court received in evidence, a land use and zoning exhibit. On this large map, actual land uses are indicated by a distinctive color. The map reflects this information in an area approaching from 1500 to 2000 feet in all directions from the subject property. Study of the map tends to support the statement above made that, with reference to actual land uses, the area in close proximity to the subject property is primarily vacant and used for farming.

Defendant raised an issue with reference to the effect of the proposed project concerning fire protection. The subject property is located within the Palatine Rural Fire Protection District. The fire fighting force consists of 30 volunteer firemen and a salaried chief. They own and operate two engines with a total pumping capacity of 1750 gallons per minute. The nearest fire station is located in the Village of Palatine, some three-and-one-half miles from the subject property.

In the opinion of the fire chief, completion of the proposed project would require an increase in equipment and manpower. In addition, a fire station would be needed and he estimated the cost of this improvement as being in the neighborhood of $500,000. The defendant has a fire station which is located some eight miles from the proposed project. The defendant has no fire department but obtains its fire protection from the volunteer force above described.

Defendant also called a qualified realtor and appraiser. He also described the zoning and the actual land uses in the area of the subject property. He expressed the opinion that the highest and best use of the subject property was for single family residential development. He based this opinion upon the location of the property within defendant village and his knowledge of the surrounding area.

He also expressed the opinion that completion of the proposed project would have an adverse effect upon adjacent property. He estimated that the four single family properties above described, which are in closest proximity to the subject site, would be depreciated in value by about 20%. He estimated that properties more distant from the subject site would be depreciated in market value by from 5 to 10%. He testified that the total depreciation to properties in the surrounding area would exceed $1,000,000.

He expressed the opinion that those portions of the subject property presently zoned in the R-2 category are presently valued at approximately $7000 per acre. He expressed no opinion regarding the value of the subject property under the proposed development. This witness also testified that, if the subject property

were developed in the R-2 category for 250 single family homes, and the tract immediately to the east presently zoned R-4 were developed for 538 apartment units, these improvements would not have an adverse effect upon the estate-type character of the surrounding area.

Defendant also called a qualified planning expert who served as its consultant. He testified that he had prepared for defendant a Comprehensive Plan concerning zoning and land use and development. He defined this type of plan as a portrayal of land uses and development in the community for a future period which might extend for 20 years. In addition, he had prepared a later revision of the plan. The first of these plans was prepared by authority of a previous Board of Trustees of defendant whose terms had expired in May of 1969. This plan portrays the subject site and the large parcel immediately to the east as being zoned for and devoted exclusively to single family use. The plan also reflects an area in defendant village for development with multiapartment units. This area is located south of the Northwest Tollway which approximately bisects defendant in an east-west direction. The revision of this plan shows a slightly larger area for proposed apartment development in the same location. It also shows the subject property and the tract immediately to the east as a single family area with the exception of a rather small square area in the southeast corner of the subject property which reflects commercial uses. The record does not show precisely when the revised Comprehensive Plan was prepared. However, the witness testified that it reflected current zoning changes as made by defendant.

This witness also testified that the highest and best use of the subject site from a planning point of view would be for single family residential development. He based this opinion upon the physical characteristics of the site itself; the trend of development within the area, which he defined as single family in character, and the compatibility of single family uses upon the subject site with similar uses in the surrounding area.

Seven of the intervenors testified in their own behalf. All of them own property in varying distances from the proposed development. Snapshot photographs of their homes were identified by them and received in evidence. These witnesses made estimates as to the current value of their property; and, in some cases, of the extent of improvements made. All of them testified that they were opposed to the Residential Planned Development sought by plaintiff. Their testimony must be considered in the light of the accepted principle "***that the use of property cannot be restricted or limited merely because neighboring property owners so desire, or because they think it might protect the value of their residence." Regner v. County of McHenry, 9 Ill.2d 577, 582, 138 N.E.2d 545.

It now remains to consider the conflicting testimony as above outlined to decide the merits of the controversy. The basic legal guidelines for this determination are clear and long established. Virtually all of the principles applicable here have been enunciated in the frequently cited case of La Salle Nat. Bk. v. County of Cook, 12 Ill.2d 40, 145 N.E.2d 65. The fundamental theory is therein set forth that determination of zoning problems and the use of property is primarily a legislative function of the municipality. For this reason, every

zoning ordinance is presumptively valid. This presumption may be overcome only by clear and convincing evidence and the burden of proof rests upon the plaintiff. See 12 Ill.2d 40 at page 46.

In this same decision, the Supreme Court recognized that zoning cases are in a sense sui generis in that the validity of the zoning ordinance must be determined by the individual facts and circumstances of each separate case. (See 12 Ill.2d 40, 46.) Despite this, the Supreme Court provided us with six prime factors which should be considered in determining the validity of any zoning ordinance. (See 12 Ill. 2d 40 at pages 46, 47.) We need not repeat these factors here. They have been repeatedly stated by the reviewing courts of this jurisdiction. (See La Salle Nat. Bk. v. City of Chicago, 4 Ill.App.3d 266, 271, 280 N.E.2d 739.) Application of these criteria should be made to the situation presented by the evidence.

The zoning surrounding the subject property is virtually all in the single family residential classification. A notable and unusual exception is the R-4 or multiple dwelling zoning existing in the parcel of land immediately to the east. Considering actual land uses around the periphery of the subject property, by far the greater part of the land is vacant. The closest residential use is at the southeast corner of the property some 100 feet to the east. However, the multiple family zoning already established by defendant is closer to this home than it is to the eastern boundary of the proposed development. The next closest actual residential use is to the north across Bradwell Road, set back more than 100 feet from the northern boundary of this traffic artery.

As regards diminution of the value of plaintiff's property, the record is very clear. The value of the property, if developed as an apartment project, would be far greater than its present value as a site for residential construction under R-2 zoning. However, this situation is true in nearly every zoning case. (First Nat. Bk. of Lake Forest v. County of Lake, 7 Ill.2d 213, 227, 130 N.E.2d 267.) This factor of partial destruction of the value of plaintiffs' property must be considered concomitantly with the next principle which would inquire into the extent to which the diminution of the value of plaintiff's property "***promotes the health, safety, morals or general welfare of the public***." (See La Salle Nat. Bk. v. County of Cook, 12 Ill.2d 40, at page 47.) This, in turn, blends in with the next applicable legal principle which is a consideration of the relative gain to the public as compared to the hardship imposed upon plaintiff as property owner. This is a matter of attempting to evaluate and to balance the right of a property owner to develop and to profit from use of his property with due regard to the resulting benefit or hardship which the proposed development would inflict upon the general public.

Considering these several factors, the paucity of any actual land use in the immediately surrounding area is of prime importance. The question here is whether the public welfare is better served by retaining the area in question as vacant property in the hope that some day it may be improved with large "estate-type" residences or whether public welfare would be enhanced by making available upon the subject property a development project which will give comfortable housing to many families at a reasonable rental rate.

It is true that expense to the municipality would be increased by the project under consideration. Undoubtedly this type of occupancy would require additional fire protection measures. Undoubtedly there would be more traffic upon the peripheral highways immediately surrounding the property. On the other hand, in a project of this size, with land value and construction costs as above outlined, the added tax return to the municipality should be amply sufficient to counteract these added costs. There is no evidence in this record to the contrary. As pointed out in plaintiff's brief, the mere incidence of higher municipal costs is not "***a justifiable basis for rejecting an appropriate use of the property." (Lakeland Bluff, Inc. v. County of Will, 114 Ill.App.2d 267, 278, 252 N.E.2d 765.) Furthermore, the well reasoned opinion of plaintiff's expert is that there is a need for multiple family housing in the area of the subject property.

The remaining criteria formulated by the Supreme Court are the suitability of the purpose for which the subject property is presently zoned and the length of time that it has remained vacant as viewed in connection with land development in the vicinity. Here, there is expert testimony that the property is theoretically suitable for residential development and also suitable for apartment use as contended by plaintiff. However, as above noted, an expert witness called by plaintiff pointed out the possibility of considerable difficulty in using the subject property for single family residential purposes. In addition, there are no public water and sewer facilities presently available at the property. Applicable ordinances of defendant village require water and sewer facilities for each dwelling unit and prohibit the use of wells or septic systems

for each individual lot. Therefore, by its own ordinances, defendant has effectively prohibited development of the property as zoned; except perhaps by means of excessive and uneconomic cost.

The single family residential zoning retained by defendant in the immediate area of the subject property and the abutting land to the east is completely illusory. It has no relation to actual land use and it has effectively caused valuable land to remain vacant. Reviewing courts of Illinois have frequently described "***of paramount importance the question of whether the subject property is zoned in conformity with surrounding existing uses and whether those uses are uniform and established." (Jacobson v. City of Evanston, 10 Ill.2d 61, 70, 139 N.E.2d 205.) The failure of the immediately surrounding property to develop in any manner except for very few isolated large residences is a potent factor in urging the conclusion that the subject property is best suited for development as an apartment project. Expert opinion proves the need for apartment uses in the area to provide housing for anticipated growth in population. Defendant concedes the existence of this need and can reply only with the unsupported assertion that the demand for apartment housing at moderate cost is being met at other locations. These factors provide graphic illustration of the need in this area for a self-contained apartment project, as urged by plaintiff, which can offer all necessary services to residents within its confines.

Defendant refers to the density of proposed use upon the subject property as being from 17 to 20 units per acre. These different density figures result from two separate computations. Commencing with the total number of 1352 apartments and using a basic area of 70 acres (arrived at by excluding the eight acre

portion for business uses in the southeast corner of the subject property), we arrive at a density figure of 19.31 units per acre. However, using in the computation the entire 78 acres of the Planned Development without exception, the resulting density figure is 17.33 units per acre.

Defendant urges that this proposed use is intensive and that if approved by this court it would destroy the need for making comprehensive plans by municipalities and also the value of the surrounding property. This record shows that the zoning of the subject property in the B-2 classification promulgated by the defendant in June of 1964 was entirely inconsistent with the Village comprehensive plan as originally formulated and as revised. This contradiction remained in effect for more than six years. This type of zoning was far more destructive of both of these comprehensive plans than would be the proposed project.

As regards damage to value of adjoining and other properties, plaintiff's expert testified that the proposed use is compatible with the surrounding area from a planning point of view and that the proposed project would not adversely affect any residential improvements in the vicinity. We are constrained to accept this opinion rather than the self-contradictory opinion of defendant's expert who postulated an economic damage of $1,000,000 to surrounding land values from this project but told the court that no harm would result to these same properties from development of apartment uses in the area immediately to the east of the subject property. This evidence of depreciation is most difficult to accept when it is considered that the property adjoining to the east is zoned R-4 and the great bulk of other property in the immediate area is devoted primarily to farming.

Perhaps the synthesis of these various factors may be found in the pronouncement of the Supreme Court to the effect that, "The law does not require that the subject property be totally unsuitable for the purpose classified but it is sufficient that a substantial decrease in value results from a classification bearing no substantial relation to the public welfare." (La Salle Nat. Bk. v. County of Cook, 12 Ill. 2d 40, 48, 145 N.E.2d 65.) This test also has frequently been applied by reviewing courts of Illinois. (La Salle Nat. Bk. v. Vil. of Harwood Heights, 2 Ill.App.3d 1040, 1047.) In the case at bar, it appears that there is a substantial decrease in the value of plaintiff's property which flows directly from the imposition of a zoning classification which bears no substantial relation to the public welfare. On the contrary, public welfare in a broad and utilitarian conception is adversely affected by the present zoning classification and would be enhanced by the proposed improvements. Rezoning of the subject property to R-2 by defendant will not redound to public benefit or welfare. It will merely help make certain that the tract will remain vacant and unused. At best it is arguably for the benefit of a very few owners of farm estates in the immediate vicinity and the evidence tends to negate even this.

The briefs before us take conflicting positions as regards the necessary quantum of proof imposed upon plaintiff in the zoning case at bar. Defendant urges that there is a lack of clear and convincing evidence sufficient to overcome the basic presumption of validity of the zoning enactment. Plaintiff contends that the mere presence of conflicting evidence adduced by the municipality does not necessarily lead to the conclusion that the validity of the ordinance is, therefore, debatable. (People v. Village of Elmwood Park, 27 Ill.2d 177, 183, 188 N.E. 2d 684.) Plaintiff urges that this record presents merely a

conflict of testimony and questions of credibility and that the finding of invalidity of the ordinance by the trial court should not be disturbed unless it is manifestly contrary to the weight of the evidence. (La Salle Nat. Bk. v. County of Cook, 12 Ill.2d 40, 48, 145 N.E.2d 65. See also First Nat. Bk. of Skokie v. Village of Skokie, 3 Ill.App.3d 201, 208, 278 N.E.2d 496.) On the contrary, defendant urges that because of the presumptive validity of the zoning ordinance there is "***a dimension of proof not required in most nonzoning litigation." Chicago Title & Trust Co. v. City of Chicago, 130 Ill.App.2d 45, 50, 264 N.E.2d 730.

We conclude that the judgment of the trial court is proper under application of either standard. This conclusion is particularly supported; and, in fact, required by the peculiar facts and circumstances existing here. As above pointed out, in June of 1964, the entire subject property was zoned under the B-2, Central Business District classification. At the same time, a portion of the tract immediately to the east was zoned R-4. This B-2 zoning permitted a multitude of diverse business and commercial uses. This zoning remained in effect for almost six years. Certain of the improvements in the immediate vicinity were built or improved when the owners presumptively had full knowledge of this zoning.

When plaintiff purchased the subject property, this zoning classification remained unaltered. It was only in August of 1970, when plaintiff requested rezoning of the subject property and creation of a Planned Residential Development, that defendant responded by rezoning the property to a residential R-2 classification permitting one individual dwelling for every unit of

10,000 square feet. When plaintiff purchased the subject property zoned B-2, it had a right to rely upon this zoning classification and to assume that it would "***not be changed except for the public good." (Langguth v. Village of Mount Prospect, 5 Ill.2d 49, 52, 124 N.E.2d 879.) Common sense would then have dictated that a self-contained apartment project would be more generally desirable than a proliferation of the type of uses authorized by the B-2 zoning. The village not only rezoned plaintiff's property R-2 but it permitted the adjoining land to remain zoned R-4. We cannot help but regard this type of zoning change as an infringement upon the liberty and the property rights of plaintiff. In Northern Trust Co. v. The City of Chicago, 4 Ill.2d 432, 437, 123 N.E.2d 330, the Supreme Court aptly stated the applicable principle:

> "Insofar as the property owner is concerned he has the right to rely upon the rule of law that the classification of his property will not be changed unless the change is required for public good. (Zilien v. City of Chicago, 415 Ill. 488; Baltis v. Village of Westchester, 3 Ill.2d 388.) Every owner has a right to use his property in his own way and for his own purposes, subject only to the restraint necessary to secure the common welfare. This is both a liberty and a property right. (Village of La Grange v. Leitch, 377 Ill. 99.)"

Viewed in the context of this background, we find that the evidence is ample to support the findings of the trial court; the proposed use is compatible with the subject property and the highest and best use of the property is commensurate with the proposed use. The record thus shows that the proposed Residential Planned Development constitutes a reasonable use of the subject property.

In the case at bar, the defendant village saw fit to zone a large and desirable tract of land for Central Business uses.

This zoning conflicted with the testimony of defendant's own expert planner that the Comprehensive Plan for future development of the defendant village treated this tract of real estate as residential. The zoning also contradicted the testimony of the expert that the Plan was intended to reflect current zoning changes. For more than six years the defendant persisted in maintaining this zoning classification. Defendant should not be permitted at this late date arbitrarily to change the zoning of this property to the great detriment of plaintiff without some most compelling reason. If defendant and its inhabitants, including intervenors, desired to keep this particular area solely for development of luxurious "estate-type" residence use, to the exclusion of apartment housing for ordinary people, it was incumbent upon defendant to use vigilance in maintaining a solid and unbroken front of completely restricted single family residential zoning.

Upon review of this record, we find the judgment of the trial court fully supported by the evidence and it is, therefore, affirmed.

Judgment affirmed.

BURKE, P. J. and DIERINGER, J. concur.

No. 57303

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| EDWARD GABRIEL and HELEN GABRIEL, Plaintiffs-Appellees, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY |
| vs. | ) | |
| EDWARD J. SUESS, Defendant-Appellant. | ) | HONORABLE JOSEPH B. HEYMES, PRESIDING. |

PER CURIAM (Fifth Division, First District):

Edward Gabriel and Helen Gabriel, plaintiffs, brought this action against Edward J. Suess, defendant, for the breach of an alleged contract for the sale of oil and gas rights. A summary judgment was entered in favor of the plaintiffs in the sum of $4,500 and the defendant appealed. The issue presented for review is whether a genuine issue as to any material fact exists, and,if not, then whether plaintiffs were entitled to a summary judgment.

The plaintiffs filed a complaint alleging that the defendant sold them a one-eighth working interest in an oil and gas lease in certain land in Richland County, Illinois; that they paid the defendant the sum of $4,500; that an assignment of said working interest, dated October 20, 1967, was filed February 7, 1968 and recorded in Richland County, Illinois; that said assignment was erroneous and did not transfer any valid interest in any oil wells; that defendant knew that the legal description was false and fraudulent; and that plaintiffs demanded the return of the money, but the defendant refused to refund said sum.

Defendant was granted leave to file his answer on January 6, 1972. The answer of the defendant denied that he entered into any agreement whereby the plaintiffs would purchase any interest in any lease; denied that he prepared or delivered to plaintiffs any assignment as alleged; denied that the plaintiffs paid the sum of $4,500 to him for the assignment as alleged; denied that he knew the legal description allegedly contained therein was false or

fraudulent; and denied that plaintiffs never made a demand on him for the return of the money. As an affirmative defense the defendant stated that the alleged assignment, on its face, purports to be an assignment from Sandy Oil Company; that on the date of the alleged assignment Sandy Oil Company was a duly qualified corporation under the laws of the State of Illinois; and that he is not individually responsible for the acts of the corporation.

The plaintiffs did not reply to this affirmative defense. Rather, they filed a motion for summary judgment, attaching thereto the affidavit of Edward Gabriel. Gabriel asserted, in addition to repeating the allegations in the complaint: that the defendant represented that the oil well was pumping oil; that there was an agreement made with Pure Oil Division of Union Oil Co. to purchase said oil; that Pure Oil Co. was paying royalties thereon; and that the defendant made conveyances of working interests in the same property to other purchasers, without having any legal right to make said conveyances. The defendant filed his counter-affidavit, which substantially repeated the statements made in his answer.

OPINION

Section 57(3) of the Civil Practice Act (Ill. Rev. Stat., 1971, ch. 110, par. 57(3)) provides that a summary judgment should be rendered "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law." The right of a party to invoke this remedy must be free from doubt. Watkins v. Lewis (1968), 96 Ill.App.2d 182, 188, 237 N.E.2d 830, 833. Brooks v. Dean Berenz Asphalt Co., Inc. (1967), 83 Ill.App.2d 258, 261, 227 N.E.2d 100, 102. Affidavits in support of a motion for summary judgment should be strictly construed and must leave no question as to the movant's right to judgment, whereas the opposing party's counter-affidavits should receive a liberal construction. (American Nat. Bank

& Trust Co. v. Lembessis (1969), 116 Ill.App.2d 5, 10, 253 N.E.2d 126, 128.) The first purpose of summary judgment procedure is to determine whether there is a genuine issue of material fact, not to try it. Standard Oil Co. v. Lachenmyer (1972), 6 Ill.App.3d 356, 360, 285 N.E.2d 497, 500.

Applying the foregoing law to the record before us, it is apparent that genuine issues of material fact do exist. Defendant denied that he entered into an agreement whereby plaintiffs would purchase a one-eighth interest in an oil and gas lease in certain land in Richland County, Illinois; denied that he prepared or delivered to plaintiffs any assignment as alleged in the complaint; denied that the plaintiffs paid him the sum of $4,500 for the assignment; denied that he knew the legal description allegedly contained therein was false or fraudulent; and denied that plaintiffs ever made a demand on him for the return of the money. Further, whether the plaintiffs dealt with the defendant as an individual or dealt with the Sandy Oil Company as a corporation is a genuine issue of material fact. (Joseph D. Foreman & Co. v. Neri (1972), 6 Ill. App.3d 313, 314-315, 285 N.E.2d 528, 530.) In the case at bar, the pleadings and affidavits raise genuine issues as to many material facts. The trial court should not have entered an order for summary judgment. Smith v. Travelers Insurance Co. (1971), 131 Ill.App.2d 476, 266 N.E.2d 695.

The order of the trial court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded with directions.

No. 56160

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| ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST and JOHN ZEHR, by William Zehr, his father and next friend, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY |
| Plaintiffs-Appellees, | ) | |
| vs. | ) | |
| THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, | ) | HONORABLE EDWARD J. EGAN, PRESIDING. |
| Defendant-Appellant. | ) | |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

This appeal involves an action brought by Illinois Conference of the United Church of Christ (hereinafter "plaintiff"), seeking a declaration of insurance coverage under a comprehensive policy of general liability insurance issued by defendant on a claim for injuries which had been presented against plaintiff by John Zehr. Both parties filed motions for summary judgment. The trial court granted plaintiff's motion and denied defendant's motion. Defendant now appeals.

The facts of the case are not in dispute. Plaintiff operates the Pilgrim Park Camp at Depue, Illinois, as a summer camp for the use of its members. Defendant issued to plaintiff a general insurance policy covering Pilgrim Park Camp. The campgrounds consist of one continuous unbroken piece of property. The northern part of the property is woodland and is referred to as the high property. The southern part of the property contains buildings and is referred to as the low property. The park entrance is located on the southern boundary of the property. A creek runs in an east-west direction across the property approximately one-quarter mile north of the southern boundary. There is a walking bridge across the creek; but no bridge upon which a motor vehicle may be driven. There is a service road extending from the northern edge of the property to a swimming

pool.

Shelby Township Road is a public road running north from Route 29 one and one-quarter miles to the main entrance of the camp, then east contiguous to the southern boundary of the camp to its southeast corner, then north contiguous to the eastern boundary of the camp, for a short distance, and turning northeast through privately owned farmland. About one-half mile east and north of the camp entrance the road turns northwest and cuts across a very small corner of the high property. A service road leading to the camp's pool connects to this road. Thereafter the road turns north and continues on. The distance from the camp entrance to the northeast corner of the camp along Shelby Township Road is 2 1/2 miles.

On August 19, 1966, a camp counselor, in returning from a picnic, drove the camp owned 1953 Ford truck upon Shelby Township Road to go from the high property to the low property. An accident occurred upon that part of Shelby Township Road which is approximately one-half mile north and east of the camp entrance. John Zehr was a passenger in the truck at the time of the accident. Having purchased a newer vehicle for other use in 1964, the 1953 Ford truck was not registered with the State of Illinois and had not been registered since 1964 because, according to plaintiff, it was intended for plaintiff's own use solely on the campgrounds. Plaintiff now argues that this accident was covered by the insurance policy issued by defendant. The insurance policy contained the following exclusion:

> This policy does not apply *** to the ownership, maintenance, operation, use, *** of *** automobiles if the accident occurs away from such premises or the ways immediately adjoining.

The standard for construing an insurance policy has often been stated to be that where a policy is not ambiguous the terms used in the policy are to be understood according to the plain, ordinary and popular sense. Walsh v. State Farm Mutual Automobile Insurance (1968), 91 Ill.App.2d 156, 160, 234 N.E.2d 394, 397. Several courts

have considered the question of whether this clause presents any ambiguity, and the interpretation it is to be given.

Connolly v. Standard Casualty Co. (1955), 76 S.Dak. 95, 73 N.W.2d 119, was an action for indemnification under a comprehensive liability policy. The policy specifically excluded automobiles used "away from the premises or the ways immediately adjoining." The insured owned a large farm, part of which was separated by a railroad right-of-way. A public road bordered the right-of-way and was commonly used to go from one part of the farm to the other. The accident for which coverage was sought occurred while on farm business on that part of the public road which did not itself touch the insured farm. The plaintiff made an argument similar to that in the instant case when he argued that the place where the accident occurred was used as part of the farm and was therefore covered by the insurance policy. The court specifically rejected this argument, holding that the term "immediately adjoining" is not ambiguous and means the area "abutting or touching."

General Accident Fire and Life Assurance Corp. v. Woeffel (1957), 7 Misc.2d 952, 161 N.Y.S.2d 794, was an action for a declaratory judgment determining plaintiff's liability under a general liability insurance policy. An employee of the insured gas station drove a car which had been left at the station out of the station and hit another automobile parked on the street in front of the market which was next door to the insured service station. The insurance policy provided coverage for accidents occurring on the insured premises or on the "ways immediately adjoining." In denying liability, the court held the term "immediately adjoining" is clear and means only "that portion of the highway which bounded the insured premises."

Other courts which have considered this question have also held that the words "immediately adjoining" present no ambiguity and embrace only the area abutting or touching the insured area. United States v. Great American Indemnity Company of New York (1954), 214 F.2d 17; Travelers Indemnity Co. v. Bohn (1970), 460 S.W.2d 642;

Pickens v. Maryland Casualty Co. (1942), 141 Neb. 105, 2 N.W.2d 593; Caribou Four Corners, Inc. v. Truck Insurance Exchange (1971), 443 F.2d 796; Cristal v. American Casualty Co. (1931), 107 N.J.L. 394, 153 A.490; Long v. London and Lancashire Indemnity Co. of America (1941), 119 F.2d 628; Aetna Casualty and Surety Co. v. Firemans Fund Insurance Co. (1963), 40 Misc.2d 813, 244 N.Y.S.2d 159.

In the case at bar, the plaintiff has cited no cases which deal with the interpretation of the term "immediately adjoining." No authority has been cited nor could any be found by us which support plaintiff's argument that this policy is ambiguous and should be construed against the insurer. When an insurance policy is clear and unambiguous, its terms must be given their normal meaning. Olipra v. Zambelli (1971), 1 Ill.App.3d 607, 274 N.E.2d 877. The policy here is clear and unambiguous. The accident in question occurred on a public road one-half mile from the insured premises. At the point of the accident the road was not contiguous to or touching the insured premises in any way. The insurance policy in question did not cover the area where the accident occurred.

For the foregoing reasons, the judgment of the trial court in granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment is reversed in its entirety, and the cause is remanded with directions to grant defendant's motion for summary judgment.

Judgment reversed and remanded with directions.

(ABSTRACT ONLY)

56184

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. |
| v. | ) | |
| RONNIE LEE TAGGART, Defendant-Appellant. | ) | HONORABLE EARL E. STRAYHORN, Presiding. |

MR. JUSTICE EGAN delivered the opinion of the court:

The defendant, Ronnie Lee Taggart, was indicted for murder, found guilty of involuntary manslaughter in a bench trial and sentenced to a term of one to seven years. The defense contends on appeal that the prosecutor's cross-examination of the defendant was prejudicial and the defendant was not proved guilty beyond a reasonable doubt.

The defendant testified that on the night of October 30, 1970, he won a .38 caliber revolver in a dice game. He looked for a friend, Arthur Crump, to ask him to keep the revolver at Crump's home temporarily. He found Crump in John Marshall High School where a dance was taking place. While in the school the defendant showed Crump the revolver and cocked it. He became frightened that a school guard might see him with the revolver, stuck the loaded and cocked revolver into the waistband of his pants and covered it with his coat. He then walked outside and down the school steps. He passed a group of people including Wade Brown. Brown was talking to two girls who were seated on a pillar at the top of the stairs. One of these girls was Doris Thomas. The defendant heard Brown say something to him but did not want to stop because he was thinking about the revolver. Brown grabbed him, spun him around and asked, "Man, what are you trying to do, man, ignore

me or something." The defendant was afraid that Brown would shove him again and that the revolver would discharge; he closed his eyes, jumped off the step, and pulled the revolver from his waistband. The revolver discharged and a bullet struck Doris Thomas standing at the top of the stairs, killing her.

The defendant testified that he did not aim the revolver in any particular direction. He did not intend to fire the revolver, but his finger was on the trigger when the revolver went off. He then turned, walked away, and was almost immediately apprehended by the police.

Officer Cici and his partner, Officer Dalesandro, were sitting in a patrol car directly across the street from the entrance way when the shot was fired. Officer Cici testified that his attention was drawn to the area when he heard the shot. He saw the defendant lowering his arm which was at a 90 degree angle. Before Officers Cici and Dalesandro could reach the defendant, Officers Lumb and Weller had placed him under arrest.

Wade Gene Brown testified that he and the defendant were friends for about five or six years, and he still considered the defendant his friend. He was talking to the girls when the defendant came out the door. He called to the defendant, but he did not answer. He asked if the defendant was trying to ignore him, but again the defendant did not say anything. Brown then went to shove the defendant, and he heard a shot. After the shooting the defendant was facing him about two or three feet away holding the gun. Brown said that he was joking with the defendant and did not intend to start a fight. He intended to meet some other friends at the dance. He knew the defendant's girl friend, who was at the dance. The State's

Attorney asked him if he was looking for her that night and he said that he was looking for some of his friends. The Court sustained an objection to the State's Attorney's question: "Was she considered some of your friends?"

In the cross-examination of the defendant the State's Attorney asked questions obviously designed to show that Wade Brown was trying to see the defendant's girl friend and that he had argued with Brown, who told him to leave.

The defendant cites People v. Black, 317 Ill. 603, 148 N.E. 281, and People v. Nuccio, 43 Ill.2d 375, 253 N.E.2d 353, for the proposition that the prosecution could not base its cross-examination on unsupported allegations and insinuations. Whether the questioning of the defendant was improper, we need not decide. The State's Attorney argues that the questions were designed to prove motive. It may be fairly argued that the trial judge in his finding of not guilty of murder concluded that the State had not proved it. Before a judge's finding may be reversed, it must affirmatively appear that the court was misled or improperly influenced by improper evidence. (People v. Grodkiewicz, 16 Ill.2d 192, 199, 157 N.E.2d 16; People v. Grabowski, 12 Ill.2d 462, 467, 147 N.E.2d 49.) To the contrary, it seems that the record shows the opposite, that the trial judge of wide experience in the conduct of criminal cases was not misled or improperly influenced.

The defendant also contends that the evidence did not show that his conduct was "reckless" as required for a conviction of manslaughter under the statute:

> (a) A person who kills an individual without lawful justification commits

> involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly. Ill.Rev. Stat. 1971, ch. 38, sec. 9-3.

He asserts that the evidence shows only that he acted negligently, citing People v. Post, 39 Ill.2d 101, 233 N.E.2d 565. In Post, the defendant saw a prowler get out of his car, cross to the alley, crouch behind a picket fence and hedge and sneak along the alley. The prowler then got on the defendant's fence near his bathroom at the rear of the house. The defendant yelled at the prowler who ran for his car. The defendant claimed that he shot his .22 caliber pistol toward the ground in an attempt to frighten the prowler. The bullet extracted from the prowler's body was flattened at the end. The pathologist said the flattening could have been caused by striking a bone or ricocheting off the street. There was no evidence that the bullet had struck a bone. The Supreme Court held that the shooting of a .22 caliber pistol toward the ground is not per se reckless and is not such an act as would likely cause death or bodily harm to a person some distance away.

Another case cited by the defendant, In Re Interest of Landorf, 7 Ill.App.3d 89, 287 N.E.2d 21, is also not on point. In Landorf, the court found that the defendant was not proved guilty of reckless conduct where the testimony indicated that he saw the bullet clip removed from an automatic pistol but may have not seen one of his friends reload the pistol. The pistol fired while in the defendant's hand striking another friend in the chest. These facts are not parallel to the instant case where admittedly the defendant knew that the revolver was loaded and cocked.

In People v. Mitchell, Appellate Court, First District, No. 55732, January Term, 1973, the defendant was indicted for murder and found guilty of involuntary manslaughter. The court said:

> The difference between these mental states is two-fold. First, recklessness requires the conscious disregard of a substantial and unjustifiable risk that circumstances exist or that a result will follow; but negligence requires only a lack of awareness of such a risk. Second, recklessness requires gross deviation from the standard of care which a reasonable man would exercise in the situation; but negligence requires only substantial deviation from that standard. (Page 5.)
>
> * * *
>
> A gun is a deadly weapon capable of killing another. Numerous Illinois cases (cites omitted), indicate that handling a gun improperly may be reckless conduct. (Page 6.)

The facts in this case are even stronger than in Mitchell since the defendant there, the trial court held, did not know whether the gun was loaded or not.

The defendant's testimony shows he was sufficiently aware that a loaded, cocked pistol in his waistband was a danger to himself. He should also be charged with the knowledge that taking it out of his waistband in the presence of several people, putting his finger on the trigger and raising it made it even more dangerous.

The evidence establishes the defendant's guilt of involuntary manslaughter and the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.

72-28

UNITED STATES OF AMERICA

State of Illinois )
Appellate Court ) ss.
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On March 6, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 72-28

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Abstract

| | | |
|---|---|---|
| CITY OF LOVES PARK, Plaintiff-Appellee, v. DONALD EVANS, Defendant-Appellant. | ) | Appeal from the Circuit Court of the 17th Judicial Circuit, County of Winnebago, Illinois. |

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, Donald Evans, was found guilty in a bench trial of erecting a sign less than ten feet over a public sidewalk, in violation of an ordinance of the City of Loves Park. He was fined $5, plus $5 costs.

The stipulated facts show that on October 1, 1971, defendant owned and operated a Standard Oil Service Station in Loves Park, Illinois. As the operator of this station, defendant periodically received packages of signs advertising promotions of the Standard Oil Company. In displaying these signs, defendant customarily attached one sign to the south side of a light pole located next to a public sidewalk.

On or about October 1, 1971, defendant instructed an employee to display the signs from a promotion package. Without the defendant's knowledge, the employee attached a cardboard sign to the north side of the aforesaid light pole approximately seven feet above the ground in such a manner that it protruded over a public sidewalk. This proceeding resulted.

On appeal, defendant argues (1) that the verdict is against the manifest weight of the law and the evidence; (2) that the City failed to prove an element of the offense; and (3) that the penalty provision in the Code of Ordinances is unconstitutional as applied to the ordinance under which defendant was convicted.

The plaintiff City has failed to file a brief in this court. It does not appear that in this case the public interest or ends of justice demand that we proceed to the merits. We therefore reverse the judgment pro forma. People v. Spinelli (1967), 83 Ill.App.2d 391; People v. Kuzas (1968), 100 Ill.App.2d 332; People v. Keeney (1968), 96 Ill.App.2d 323.

Reversed.

THOMAS J. MORAN, J. and GUILD, J. concur.

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2-20-7[illegible]
[illegible]

NO. 71-38



IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Appellee, | Appeal from the Circuit Court of Madison County. |
| vs. | |
| JOHN KARLOVICH, Appellant. | Honorable Andreas Matoesian, Judge Presiding. |

MR. JUSTICE CREBS delivered the opinion of the court:

In a jury trial in the Circuit Court of Madison County defendant was convicted of resisting arrest and was sentenced to one year probation and fined $250 plus costs. He has appealed contending, among other things, that the verdict was against the manifest weight of the evidence.

We find ourselves somewhat handicapped in our review in that the State has failed to file a brief and the record does not appear to be complete. From the defendant's brief and the transcript it is apparent that defendant was also convicted of public indecency and aggravated assault, but the record contains no reference to these two offenses. A copy of the court's minute sheet refers only to a conviction and sentence for resisting arrest. The criminal complaint contained in the record charges that defendant "did knowingly resist and obstruct the performance of John Browning knowing said person to be a peace officer and while said officer was engaged in the performance of his official capacity, towit: he did refuse to go with and resisted officer being told (sic) he was under arrest * * *." This charge is in the language of Chapter 38, Section 31-1, Illinois Revised Statutes,

and we assume that it is the basis of the charge though a different and unrelated reference is made in the complaint.

The State presented evidence that at about 7:30 in the evening on August 19, 1970, defendant was observed walking around his trailer in the nude. Two women observed him from the house next door and one woman from a house across the street and four houses down. One of these women stated that some children called her attention to the defendant and that she "jumped up and went out on the porch to see". They all agreed that no "sexual action" occurred, but that for about 30 minutes they observed him through a picture window walking back and forth. The police were called and the women saw them enter defendant's trailer and subsequently come out with defendant handcuffed, with a police officer on each arm, and digging his feet in trying not to go.

Two police officers testified that they could see defendant was nude through the window and that he was nude when he answered the door. They told him that they could not tolerate his walking around naked where people and children could see him. When they asked him to close the drapes he refused stating, "it was his damned house and he would do as he damn well pleased". Further conversation led to angry remarks by defendant, but both officers agreed that they then started to leave with no intention of making an arrest. As they left defendant stood in the doorway protesting and still naked. One officer said defendant started toward the other officer with his fist and then they both grabbed defendant, maced him and told him he was under arrest. The other officer stated that as they left and got outside he told defendant to step back from the doorway, to close the door, and stop his verbal abuse or he would be arrested. Not until he refused to step back did they decide to arrest him and then both officers grabbed him, used mace on his face and struggled with him as they handcuffed him and put

on his pants. He was then taken to the hospital to be treated for the affects of the mace but he refused treatment and continued to protest profanely and belligerently. He was then taken to the station and kept confined over night.

Defendant testified that he got home that evening about 6:00 o'clock, that he was dirty and grimy after working all day on an old porch installing gutters, and that he turned on the gas water heater to take a bath. His wife had previously burned herself severely on the hands and feet from grease in an electric fryer. He helped her out of bed to the living room, took his bath, and without getting dressed, fixed her a drink and started to make supper. He stated that when the police came in they just grabbed him, shot him with mace and handcuffed him. He did not know where they took him and the next thing he remembered he was in a cell. Defendant's wife stated that her husband was naked after he took his bath, but that they did not know people were watching. It was a terribly hot day and the drapes were open. She said that because of her burns he helped her from the bedroom, fixed them a couple of drinks and then put something in the oven for supper. She said the police burst in, would not listen to reason, handcuffed her husband and took him away. A nurse testified that she was present when defendant was brought to the emergency room by an officer and that he had refused treatment. She stated that defendant had not used any profane language but merely had refused to be treated. She also stated that defendant had come to the hospital the next evening to ask if he had been there the previous evening.

In defendant's brief he intimates that the public indecency charge was either dismissed or nolle prosequed, and it might have been. At any rate we are not concerned with that charge on this appeal or with the charge of aggravated assault. On the charge

of resisting arrest the two officers contradicted each other. One stated that the arrest was precipitated by defendant swinging at the other, but this officer stated they came back to arrest defendant because he refused to abide by an order to step back from the open doorway and shut the door. Naturally, there was some struggling when defendant was shot directly in the face with the chemical mace, but this cannot be the basis for a charge of resisting arrest. Contrary to police testimony no one of the women testified that they saw the police go back after having left the house, and the nurse denied that there was any abusive language or profanity at the hospital.

We are aware of Section 7-7 of the Criminal Code (Ill.Rev. Stat., ch. 38, sec. 7-7) providing that a person is not authorized to use force to resist an arrest even if he believes the arrest to be unlawful. Undoubtedly had the State filed a brief they would have cited this section together with precedents quoting it. The defendant cites People v. Royer, 101 App.2d 44, holding that sec. 7-7 is not applicable unless the State first proves under sec. 31-1 that the act of the arresting officer was authorized.

Under the circumstances of the case before us we do not believe it necessary to consider that question. It is well settled that a conviction will be reversed where the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt even where the conviction is a result of a jury trial. (People v. Broome, 130 Ill.App.2d 227; People v. Jefferson, 1 Ill.App.3d 484.) Here we find highly conflicting and unsatisfactory evidence to support the charge of resisting arrest. Accordingly, we cannot say that no reasonable doubt of defendant's guilt remains.

The judgment of the Circuit Court of Madison County is reversed.

Reversed.

CONCUR: Edward C. Eberspacher

CONCUR: Charles E. Jones

Publish abstract only.

55402

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY |
| | ) | |
| vs. | ) | |
| | ) | |
| JOSE L. CHACON (Impleaded), | ) | HON. LOUIS B. GARIPPO, JUDGE PRESIDING. |
| Defendant-Appellant. | ) | |

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

Jose L. Chacon (defendant) was indicted with Cruz M. Torres in a three-count indictment charging the offenses of attempt murder, aggravated battery, and aggravated battery of a police officer, in violation of sections 8-4, 12-4(b)(1), and 12-4(b)(6), respectively, of the Criminal Code. (Ill. Rev.Stat. 1967, ch. 38, pars. 8-4, 12-4(b)(1), 12-4(b)(6).) After a bench trial, defendant was found guilty on all three counts and was sentenced to a term of one year to fifteen years in the penitentiary. He appeals. (Cruz M. Torres was found guilty of simple battery, was sentenced to a term of six months and placed on probation for three years, and is not involved in this appeal.)

Chicago Police Officer Fowler testified for the State that he was assigned to the area of 1500 West 21st Street on March 10, 1969, relative to a pattern of auto theft which had been taking place in that vicinity. He testified that he was on patrol in an unmarked police vehicle, accompanied by Officers Vollick and Rusnak, all of whom were dressed in civilian clothing, and that he observed defendant and Torres park and alight from a car at about 12:55 A. M. that morning. Defendant and Torres, who was drinking from a beer bottle, proceeded down the street on foot, and on their way they looked into and tried the doors of automobiles parked along the street. Officer Fowler testified that he got out of the police vehicle and proceeded on foot to

the mouth of an alley to get a better view of the two men, and that as he emerged from the alley he observed defendant breaking and prying with the blade of a knife a vent window of a nearby vehicle and Torres standing close by. The officer testified that he stepped from the alley, his gun in his right hand and his badge in his left, announced his office, and told the two men to place their hands on the car. He testified that thereupon Torres came upon him, hitting him with the bottle about the shoulders, and that defendant came upon him and stabbed him in the heart with the knife. The officer testified that as defendant appeared to be preparing to make another move with his knife he fired four shots at him. He was taken to a hospital where he underwent surgery.

Officers Vollick and Rusnak testified and corroborated Fowler's account of the events leading up to the latter's departure from the police vehicle. Officer Rusnak stated that he observed the defendant lying on the sidewalk, with a knife nearby. He apprehended Torres.

Torres testified in his own behalf and stated that he and defendant had been drinking that night, that on their way walking back to where their car was parked, the witness detoured into an alley to urinate, that a man drove into the alley and alighted from the vehicle with a gun, and that the witness was told by the man with the gun to place his hands on a nearby auto. The witness stated that as defendant was walking toward him and the man, the man shot defendant and defendant stabbed the man. The man, who did not say he was a police officer and who the witness did not think was an officer, then shot defendant in the back. The witness denied tampering with autos along the way to their automobile and further denied striking or touching the officer.

Defendant testified in his own behalf that after he noticed Torres was not with him as they were walking toward heir auto, he turned and observed a man pointing a gun at Torres; the man told the defendant to "come over here." Defendant testified that he thought Torres was being held up, because both he and Torres had money on their persons that night, and that when the witness was about five feet from the man, the man shot him. Defendant stated that he removed his knife from his pocket, stabbed the man, and was shot again. The witness did not know the man with the gun was a police officer and further denied tampering with automobiles enroute to their own vehicle.

Defendant's first contention is that he was not proved guilty beyond a reasonable doubt. He argues that the State's evidence is weak, thereby entitling him to acquittal by reason of his defense of self-defense, and further that the State failed to prove the elementof intent.

From the foregoing summary of the evidence adduced at trial, it is evident that the determination of what transpired prior to the confrontation between Officer Fowler and defendant and Torres was one for the trier of fact. The State's evidence and that adduced by the defense were incompatible. If the officers' testimony was to be believed, Chacon and Torres were the aggressors and thus not entitled to the defense of self-defense. People v. Rossini, 25 Ill.2d 617, 185 N.E.2d 831. If, on the other hand, Chacon and Torres were to be believed, such defense would be available to them. People v. Henry, 3 Ill.App.3d 235, 278 N.E.2d 547. The trier of fact chose to believe the evidence adduced by the State, and we cannot say that that determination was manifestly erroneous or the evidence incredible.

Defendant's observation in his brief that he had "limited understanding of the English language," so as to raise the "possibility" that he did not understand Fowler when he announced his office, is rebutted by the record.

Defendant's intent to murder Officer Fowler is demonstrated by his very act of stabbing the officer. He was armed with a dangerous weapon which, to any reasonable man, could result in death in the event an encounter occurred. People v. Coolidge, 26 Ill.2d 533, 187 N.E.2d 694. Not only did the use of that weapon by Chacon evidence his intent to commit murder, but the very place where he stabbed the officer - in the heart - conclusively shows that intent.

The cases cited by defendant in support of this point involve circumstances where the deceased was the aggressor: People v. Honey, 69 Ill.App.2d 429, 217 N.E.2d 371; People v. Givens, 26 Ill.2d 371, 186 N.E.2d 225; People v. Morgan, 114 Ill.App.2d 421, 252 N.E.2d 730. See also People v. Henry, 3 Ill.App.3d 235, 278 N.E.2d 547.

Defendant also contends that the trial court improperly found him guilty on all three counts of the indictments for acts stemming from a single incident.

Where there is a finding or verdict of guilty on several counts or indictments charging separate crimes arising out of the same transaction, the convictions will not be reversed where the sentence was imposed for the greater of the crimes charged and no sentence imposed for the lesser. People v. Perry, 47 Ill. 2d 402, 266 N.E.2d 330; People v. Brown, 52 Ill.2d 94, 285 N.E. 2d 1. It is evident from the record and from the comments of the trial judge in the instant case that defendant was sentenced only for the crime of attempt murder. This point is not well taken.

The cases cited by defendant involve situations where the defendants were not only found guilty of more than one offense arising out of a single transaction, but were also sentenced to separate, but concurrent, terms on each finding: People v. Perry, 81 Ill.App.2d 372, 225 N.E.2d 730; People v. Schlenger, 13 Ill.2d 63, 147 N.E.2d 316; People v. Duszkewycz, 27 Ill.2d 257, 189 N.E.2d 299.

For these reasons the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

ADESKO AND DIERINGER, JJ.,

CONCUR.

(Abstract Only)

10 I.A.3 548

56412

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| Plaintiff-Appellee, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT, |
| v. | ) | COOK COUNTY. |
| SAM LINDSEY a/k/a SAMMY LINZON, JR., | ) | Hon. James M. Bailey, Presiding. |
| Defendant-Appellant. | ) | |

MR. JUSTICE DIERINGER delivered the opinion of the court:

The defendant, Sam Lindsey, was indicted for the crime of armed robbery. Following a jury trial in the Circuit Court of Cook County, the defendant was found guilty of armed robbery and sentenced to a term of 15 to 40 years in the Illinois State Penitentiary.

The sole issue presented for review is whether the sentence imposed by the trial court is excessive.

On December 18, 1970, between 12:00 P.M. and 1:00 P.M., Howard Calhoun was delivering laundry to a building located at 2823 Jackson Boulevard in Chicago. When he entered the building, he was approached by a man he subsequently described as the defendant, Sam Lindsey. The defendant was armed with a pistol and proceeded to rob Mr. Calhoun of $135.00. Later that day, Mr. Calhoun saw the defendant enter a building at 2758 West Jackson Boulevard. After seeing the defendant enter the building, Mr. Calhoun summoned a police car and related his observance to the police officers, who entered the building and arrested the defendant.

The defendant was subsequently indicted for armed robbery and was tried before a jury in the Circuit Court of Cook County. The jury found him guilty of armed robbery and a hearing in aggravation and mitigation was thereafter held to determine his sentence. The hearing revealed the fact that the defendant had a number of prior convictions and at the time of the instant offense was on probation. The trial court then sentenced the

defendant to a term of 15 to 40 years in the Illinois State Penitentiary, from which he herein appeals.

The defendant contends the sentence, 15 to 40 years in the Illinois State Penitentiary, which the trial court imposed on him is excessive.

The statutory penalty for armed robbery, as set forth in section 18-2(b) of the Code of Criminal Procedure, is imprisonment "for any indeterminate term with a minimum of not less than two years." Ill. Rev. Stat., 1969, Ch. 38, § 18-2(b).

When the sentence is within the statutory limits, as in this instance, it will not be disturbed unless it is a departure from the norm for sentences for similar offenses committed under similar circumstances. (People v. Webb, (1972) 3 Ill. App.3d 1012.) The facts evident upon a review of the record demonstrate that the defendant's sentence is within the statutory limits prescribed for the offense for which he was convicted and, as such, we think the trial court imposed a proper sentence.

For the reasons stated herein, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

(Abstract only)

56862

10 I.A.3 554

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| PEOPLE OF THE STATE OF ILLINOIS, | |
| Plaintiff-Appellee, | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY |
| vs. | |
| JIMMIE LOVE, | |
| Defendant-Appellant. | HON. DANIEL J. RYAN, JUDGE PRESIDING. |

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

The defendant, Jimmie Love, was charged by indictment with the murder of his wife, Carol Lee Love. After a bench trial, he was found guilty of voluntary manslaughter and sentenced to serve not less than four (4) nor more than fourteen (14) years in the penitentiary.

On appeal, defendant contends that he was not proven guilty of voluntary manslaughter beyond a reasonable doubt.

Priscilla Smith testified that on April 3, 1971, she lived at 5526 South Loomis in a two-flat building. She and the deceased were good friends and co-owners of the building. The deceased occupied the second floor apartment with her husband, the defendant, and Priscilla occupied the first floor. At approximately 9:00 P. M., Carol Love rang Priscilla's doorbell and gave her some cosmetics. She seemed to be in good spirits. After the deceased left, Priscilla went back to bed. Her bedroom is located directly underneath the bedroom of the deceased. At about 10:00 P. M., she heard someone enter the building. She heard male and female voices talking loudly for ten or fifteen minutes. She went to the upstairs door and rang the bell. While waiting for an answer, she heard a thump, like something falling down the stairs, and then heard something hit the landing inside the door. Jimmie Love opened the door. He was holding his left thigh ,

which was bleeding. Mrs. Love was lying on the floor. The defendant told her that they were having a fight and fell down the steps on the knife. He asked her to call the police.

Police Officer Robert Powers testified that he observed the deceased lying at the bottom of the stairs. She had a multitude of stab wounds all over her body and she was covered with blood. The defendant was about four stairs above her. He had a cut in the left thigh area. Investigator Thomas Quinn stated that he saw the deceased lying on the first floor landing. She had multiple stab wounds and was covered with blood. He also observed blood on the stairway leading up to the second floor apartment, in the master bedroom, in the kitchen and in the bathroom. He stated that a brown handle butcher knife was found behind the front door inside the second floor apartment. It was stipulated that if Dr. Jerry Kearns, a pathologist who performed an autopsy on the deceased, were called to testify, he would state that the deceased had seventeen stab wounds in the chest area, buttocks, thighs, vaginal area, back and front, and that in his opinion death was caused by the wounds.

The defendant took the stand on his own behalf. He said he and his wife exchanged words in the morning before he left for work. She said she was going somewhere with her aunt and he told her that was how marriages break up. During the day, she called him at work. He told her he was going to leave and that she could be single again. When he returned home from work, he told her he was going to stay with a friend. She said that was fine with her. They argued. The defendant was in the bathroom getting out of his work clothes and the deceased was in bed in the bedroom. When the defendant started to go into

the bedroom, deceased jumped out of bed. Defendant saw that she had a knife. He said he made it to the doorway leading downstairs. Then she stabbed him in the thigh and he grabbed the knife away from her. He stated, "It happened so fast, I was scared, I really don't know, I couldn't tell you exactly what happened. I was scared. I knew we was tussling down the stairs." He ran back upstairs and called the police. Then he ran downstairs and asked Priscilla to call the police. The defendant testified that he only remembered stabbing the deceased once when he was taking the knife from her. He denied telling Priscilla that they fell down on the knife.

It is established that a defendant can be convicted of voluntary manslaughter on an indictment for murder if there is evidence to support the lower grade of homicide. People v. Stepheny, 76 Ill.App.2d 131, 221 N.E.2d 798.

Defendant contends he was not proven guilty beyond a reasonable doubt of voluntary manslaughter. We disagree.

Voluntary manslaughter is defined in ch. 38, Ill.Rev.Stat. 1971, par. 9-2, as follows:

> (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
> (1) The individual killed***.
> Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.
> (b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 ["Justifiable Use of Force"] of this Code, but his belief is unreasonable.

In the instant case, the record reveals that defendant and his wife were quarreling. The deceased had a knife and stabbed the defendant once in the thigh. The defendant grabbed the knife from the deceased. Defendant testified that he remembered stabbing his wife once, but did not know how she got the other wounds. It was stipulated that the deceased received seventeen stab wounds.

We believe the trial court, acting as trier of fact, had ample evidence from which to conclude either that defendant acted under a "sudden and intense passion resulting from serious provocation" by the deceased, or that he acted in the unreasonable belief that his conduct was justifiable as self-defense. A reviewing court will not reverse a finding of guilty of voluntary manslaughter unless it is so unsatisfactory or improbable as to justify a reasonable doubt as to defendant's guilt. People v. Adams, 113 Ill.App.2d 205, 252 N.E.2d 35.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

ADESKO AND DIERINGER, JJ.,
CONCUR.(Abstract only)

57121

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM CIRCUIT COURT, COOK COUNTY. |
| v. | ) | |
| LEON HARRIS (Impleaded), Defendant-Appellant. | ) | Hon. Frank J. Wilson, Presiding. |

MR. JUSTICE DIERINGER delivered the opinion of the court:

The defendant, Leon Harris, was indicted for the crime of burglary. Following a bench trial in the Circuit Court of Cook County, the defendant was found guilty of burglary and sentenced to a term of from 10 to 20 years in the Illinois State Penitentiary.

The sole issue presented for review is whether the defendant was deprived of due process in that his in-court identification was the product of an unnecessarily suggestive pretrial confrontation which had no independent basis.

At approximately 5:50 P.M. on July 24, 1968, William Hohn parked and locked the United Parcel Service truck he was driving at the loading dock in the alley behind 223 West Jackson in Chicago. He then proceeded into the building to pick up some packages. When he returned to the truck, the lock was broken and a number of dress boxes were missing.

Robert Murphy, a Railway Express driver, testified that he was parked in the alley behind 323 South Franklin, approximately 25 yards from 223 West Jackson, when he observed a United Parcel Service truck park at the dock. Murphy further testified he saw a blue 1961 Ford with three men pass directly in front of him in the alley and park near the United Parcel Service truck. He then observed the occupants of the automobile begin to remove packages from the United Parcel Service truck and place them in the automobile. After seeing these events transpire, Murphy hailed a police car and gave the officer a description of the

automobile and its license number. While talking with the officer, Murphy observed the automobile and informed the officer who gave chase. The automobile was eventually stopped and its occupants arrested. The defendant, Leon Harris, was one of the three occupants who were arrested. The packages taken from the United Parcel Service truck were in the automobile at the time of the arrest.

A short time after the arrest, Mr. Murphy, who had witnessed the robbery, was brought to the police station to make a statement. As Murphy walked by a room in the police station, he observed the defendant and the two other occupants of the automobile. Murphy, however, was not asked if he could identify the defendant as a participant at that time. At the trial which resulted in the defendant's conviction, Murphy did identify the defendant as a participant in the robbery. The defendant herein appeals from that conviction.

The sole issue presented for review is whether the defendant was deprived of due process in that his in-court identification was the product of an unnecessarily suggestive pretrial confrontation which had no independent basis.

The defendant contends that although Mr. Murphy observed the robbery of the United Parcel Service truck, he lacked ample opportunity to observe the participants in the robbery well enough to form an independent basis for his in-court identification of the defendant. In view of this fact, the defendant contends he was deprived of due process since his in-court identification was based solely on the unnecessarily suggestive pretrial confrontation between Mr. Murphy and himself in the police station following the robbery. In support of his contention, the defendant relies primarily on the decision in People v. Blumenshine, (1969) 42 Ill.2d 508, where the court stated that if a defendant can establish that his pretrial confrontation was so unfair as to deprive him of due process, the evidence of the identification will be rendered inadmissible unless the

trial court determines by clear and convincing evidence that the in-court identification has a basis independent of the pre-trial confrontation.

A thorough review of the record in the instant case does not lend support to the defendant's contention that his in-court identification lacked an independent basis. The trial court was presented with very clear and convincing evidence in the form of Mr. Murphy's testimony as to the events prior to and including the robbery. This testimony more than adequately showed Mr. Murphy to have a thoroughly independent basis for his in-court identification of the defendant as a participant in the robbery. For this reason, we find no reason to substitute the judgment of the trial court with our own.

For the reasons stated herein, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

(Abstract only)

57342

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM CIRCUIT COURT, COOK COUNTY. |
| v. | ) | |
| STANLEY BROWN, Defendant-Appellant. | ) | Honorable Thomas R. Casey, Jr. Presiding. |

MR. JUSTICE DIERINGER delivered the opinion of the court:

The defendant, Stanley Brown, was found guilty of theft after a bench trial in the Circuit Court of Cook County and was sentenced to serve six months at the Illinois State Farm at Vandalia. He appeals from the judgment contending the evidence was not sufficient to find him guilty.

On March 10, 1972, Mrs. Trudy Schaefer returned to her home on South Maryland Avenue at 7:30 P.M. As she entered the vestibule of the three-flat building, she turned and saw two teen-age boys enter behind her. She stated the defendant stayed by the door about four feet away, and the other demanded her purse. When she refused, he struck her in the face, causing her glasses to break and fly off. One of them grabbed her purse and both fled. Mrs. Schaefer called the police, who apprehended the defendant and Johnny Taylor about five minutes later on the basis of the description she had given of Johnny Taylor.

When the defendant was in custody at the 21st District Police Station and had been apprised of his constitutional rights, he told police that he had been in the vestibule of Mrs. Schaefer's building and that the purse had been thrown against a wall on Park District property at 5800 south. Upon investigation at the designated spot only Mrs. Schaefer's checkbook was found.

Mrs. Schaefer identified the defendant at trial, but in his own testimony the defendant contradicted his earlier statement and denied being at the site of the theft.

The defendant contends the evidence was not sufficient to establish accountability because there was no evidence he attempted to aid or abet Johnny Taylor in the commission of the theft and his mere presence at the scene of the crime is not enough to establish guilt.

Section 5-2 of the Illinois Criminal Code (Ill. Rev. Stat., Ch. 38, § 5-2) provides that a person is legally accountable for the conduct of another when:

> "(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."

The same issue was raised in the case of People v. Washington, (1962) 26 Ill.2d 207, and the court stated:

> "While it is true that mere presence or negative acquiescence is not enough to constitute a person a principal, one may aid and abet without actively participating in the overt act and if the proof shows that a person was present at the commission of the crime without disapproving or opposing it, it is competent for the trier of fact to consider this conduct in connection with other circumstances and thereby reach a conclusion that such person assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the crime."

In the instant case the defendant knew Johnny Taylor and was present at the commission of the crime. He did not oppose Johnny Taylor's conduct when he demanded the purse or when he struck Mrs. Schaefer, and he fled from the scene with Johnny Taylor and had knowledge of where the purse had been discarded. From the totality of these circumstances the trier of fact could reasonably have found that the defendant was more than just an innocent bystander and "assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the crime."

For these reasons the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

(Abstract only)

ABST.

Nos. 55671, 55981

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| Plaintiff-Appellee, | ) | COOK COUNTY. |
| | ) | |
| vs. | ) | |
| | ) | |
| LEONARD MESCHINO, | ) | HONORABLE |
| | ) | KENNETH R. WENDT, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (First District, Third Division):

Defendant, Leonard Meschino, was indicted for the crime of burglary, in violation of Section 19-1 of the Criminal Code. (Ill.Rev.Stat. 1965, ch.38, par.19-1.) He was found guilty, as charged, at a bench trial and was sentenced to a term of one year to three years in the penitentiary. He appeals.

Chicago Police Officer Wilczak testified at trial that while on duty in a patrol car at about 3:30 a.m. on July 19, 1967, he had occasion to stop the defendant, who was operating an automobile at the time. There was no key in the vehicle's ignition, the metal ignition cap was missing, and defendant was unable to produce either a driver's license or an automobile registration. Defendant was placed under arrest, and he and the automobile were transported to the police station.

Officer Greasley testified that he investigated the matter and that he determined that the owner of the automobile was Frank Vaiciulis (also spelled "Varciulis" in the record) who was informed that the police had his automobile. A search by Officer Greasley of the garage from which the automobile was allegedly taken turned up a slip of paper with the name "Buster" written on it as well as other notations. The officer further testified that defendant admitted that the piece of paper belonged to him; the testimony was stricken upon objection of defense counsel, and the officer thereafter testified that he advised defendant of his Miranda rights prior to questioning him with regard to the slip of paper. The paper was admitted into evidence over objection.

At the opening of court the following day (Friday), defendant was not personally present in court and defense counsel represented to the court that it was his understanding that defendant's wife took sick, and that pursuant to a telephone call counsel was told by someone representing to be defendant's mother that defendant and his wife had gone to the doctor. The assistant state's attorney thereupon represented that he had spoken to someone shortly before the opening of court who identified himself as defendant's father and who told him that defendant was in bed at home; he further told him that defendant was not confined to bed. The court stated that the People would be allowed to proceed, that the court was not being unfair to defendant "in lieu [sic] of what the doctor said," and that defendant is "voluntarily, according to the doctor, absenting himself from the court."

Frank Varciulis testified that he was the owner of the auto driven by defendant; that he put the auto in his garage about 7:00 p.m. on July 18, 1967; that he locked both garage doors; that his son-in-law arrived home at 9:00 p.m.; that his son-in-law's car was put into the garage, which was then locked; and that the next morning about 4:30 a.m. or 5:00 a.m. he received a phone call from the police concerning his auto. The witness next saw his car at the police station. He did not tell anyone that he could use the car that night or enter the garage, other than his son-in-law. The witness stated that the ignition of his auto was left in a position so that a key was not necessary to start the auto and that the garage door had been broken open.

James Passolano testified that he was the vehicle owner's son-in-law and that he arrived home on the evening of July 18, 1967, and parked his auto in the garage, after which he locked the garage door. At mid-morning the police telephoned and questioned them concerning an auto. The witness went to the garage, found his father-in-law's vehicle gone, and also found scratch marks on the ignition of his vehicle. He was also missing a flashlight. The witness observed stripping from the garage on the ground, and the

garage door was up. Upon return to the garage from the police station, one of the officers picked up a piece of paper with writing on it, which the witness stated was not his. The witness gave no one permission to enter his auto or the garage that night.

The State rested its case, and defense counsel asked that the matter be put over until Monday, the assistant state's attorney suggesting that counsel meet with his client in the interim.

When the case was called the following Monday morning, defendant again was not present. Defense counsel represented to the court that he was unable to speak to defendant since Friday; that he was informed by the person who identified himself as defendant's father that defendant was ill and could not talk to counsel; and that counsel was unable to put on defense because he had intended to call defendant as a witness and further because the other prospective witnesses were under defendant's control. Counsel represented that he did not know where defendant was and stated that he wished to be allowed to personally go to defendant's home to determine if defendant was in fact ill or malingering. The matter was again put over until Wednesday morning.

On Wednesay morning, defendant was again not present, and his counsel told the court that defendant's father phoned him on Monday afternoon and stated that a child named Tammy Meschino had contacted infectious hepatitis and that the Meschino house had been put under quarantine. The assistant state's attorney then represented that he spoke to Officer Wilczak on Monday who told counsel that he observed the defendant raking leaves in the Meschino yard on Sunday.

While it is true that the prosecutor's comments were hearsay, so too were all the comments of defense counsel to the court as to the reason why defendant was not present in court. In any event, there were no objections made to any of the hearsay representations, and the court concluded that the defendant was voluntarily absenting himself from court.

The court, after argument of counsel on several motions, found defendant guilty and imposed sentence.

Defendant contends that his absence from the courtroom during the trial was involuntary, due to his illness, and that the court therefore should not have proceeded with the trial.

A defendant has a right to be present in the courtroom at all stages of the trial against him. (People v. Mallett, 30 Ill.2d 136, 195 N.E.2d 687.) Nevertheless, the right to be present may be waived by the defendant. People v. Steenbergen, 31 Ill.2d 615, 203 N.E.2d 404; People v. Trice, 127 Ill.App.2d 310, 262 N.E. 2d 276.

The foregoing summary of what transpired at trial in this regard clearly reveals that defendant was given every consideration under the circumstances and that the court concluded that, from the representations made by counsel, defendant voluntarily absented himself from the trial. Under these circumstances, the defendant waived his right to be present at trial, and we cannot say that the court was in error in so holding.

Defendant also argues that the testimony of Officer Greasley identifying the slip of paper was stricken, and that therefore the introduction of the paper was error because it lacked support in the evidence since it was not linked to defendant.

This was a bench trial. The trial court did at first strike the officer's testimony relative to the defendant's admissions concerning the slip of paper. However, the court later commented that the officer's testimony was stricken the first time because no evidence was adduced that Miranda warnings had been given to defendant prior to his making the statements testified to by the officer. The conclusion to be drawn from the court's long discussion with defense counsel in this regard is that he considered the officer's testimony revived by the evidence later adduced that defendant was in fact given the warnings prior to the officer's questioning. The introduction of the slip of

paper was therefore supported by the evidence, since defendant's statement to the officer linked him to the paper.

The cases cited by defendant are inapposite to the instant case, because in those cases no evidence connected the exhibits to the respective defendants: People v. Smith, 413 Ill. 218, 108 N.E.2d 596; People v. Doody, 343 Ill. 194, 175 N.E. 436; People v. Smith, 254 Ill. 167, 98 N.E. 281.

For these reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Per curiam.

56739

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE CIRCUIT |
| Respondent-Appellee, | ) | |
| | ) | COURT OF COOK COUNTY. |
| v. | ) | |
| | ) | Hon. Richard J. Fitzgerald, |
| MICHAEL MILLER, | ) | Presiding. |
| | ) | |
| Petitioner-Appellant. | ) | |

PER CURIAM:

Michael Miller pleaded guilty to the crimes of murder, attempted murder and attempted armed robbery. He was sentenced to concurrent terms of 50 to 100 years, 15 to 20 years and 10 to 14 years respectively. His pro se petition under the Post Conviction Hearing Act (Ill.Rev.Stat. 1971, ch.38,par.122-1 et seq.) was dismissed. He appeals.

The district defender, Illinois Defender Project, who was appointed to represent Miller on appeal, has filed a motion for leave to withdraw. The motion, supported by a brief pursuant to Anders v. California, (1967) 386 U.S. 738, states that the only available issues possible on appeal would be 1) did the pro se petition present an issue which required an evidentiary hearing or was there valid allegation of ineffective assistance of counsel at trial; 2) did petitioner receive effective assistance of counsel at the Post-Conviction hearing; and 3) does the record suggest a constitutional violation which resulted in the petitioner's being incarcerated wrongfully.

The brief concludes that an appeal on these issues would be legally frivolous and without merit. Miller was served with copies of the motion and brief. He was informed he could file any points he might choose in support of his appeal. He has not responded.

We have examined the record and concur in the opinion of petitioner's counsel that none of the arguments thus raised has substantial merit; nor does this Court's inspection of the record disclose any additional possible ground for appeal.

The motion to withdraw is allowed and the judgment of the circuit court dismissing the petition is affirmed.

Judgment affirmed.

PER CURIAM

57398

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| BERNICE KACINSKI, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | APPEAL FROM THE CIRCUIT |
| | ) | |
| v. | ) | COURT OF COOK COUNTY. |
| | ) | |
| WILLIAM GILES, | ) | Hon. Richard A. Harewood, |
| | ) | Presiding. |
| Defendant-Appellee. | ) | |

PER CURIAM:

This is an appeal from an order of the circuit court of Cook County which granted a petition filed pursuant to Section 72 of the Civil Practice Act and vacated a $35,000 default judgment in a personal injury case. On appeal, plaintiff argues that the defendant, (the moving party in the section 72 proceeding), did not show due diligence and freedom from negligence to obtain relief under section 72 and that the defendant's petition did not show that he had a meritorious defense.

The facts, as set out in the defendant's section 72 petition and plaintiff's answer to the section 72 petition, show the following: On August 22, 1971, the defendant, William Giles, was served personally with summons and a complaint filed against him by the plaintiff, Bernice Kacinski, asking damages allegedly resulting from an accident on December 14, 1970, when defendant's automobile struck the plaintiff, a pedestrian; Giles thereafter forwarded the summons and complaint to his insurance carrier, Kenilworth Insurance Company, who, in turn, referred the matter to the law firm of Orner and Wasserman, who instructed the law clerk of the law firm to verify service of summons on the defendant; however, due to "difficulties encountered by the law clerk" in locating the court file, service of summons was not verified until early October, 1971, when it was "ascertained" that the defendant's appearance was overdue; counsel for the defendant then prepared a "late appearance, answer, and jury demand" and served these documents along with a notice of motion to counsel for plaintiff on October 14, 1971; on October 22, 1971, these documents were filed and an order entered granting defendant leave to file his appearance, answer

and jury demand; plaintiff's answer specifically denied that notice of motion was received by her attorney on October 14, 1971, or at any other time; meanwhile, on October 6, 1971, an order of default had been entered against the defendant and a "prove up of damages" set for trial on October 13 and, on October 13, 1971, judgment for $35,000 plus costs was entered in favor of the plaintiff; on November 16, 1971, an affidavit for garnishment was filed and subsequently served upon Kenilworth Insurance Company, which was "the first knowledge had by either the defendant, defendant's insurer, or defense counsel that a default judgment had been entered"; defendant filed his verified petition on December 6, 1971, seeking to vacate the judgment of October 13; plaintiff denied that she calculated to keep the default judgment hidden or that defendant had a meritorious defense, since he had signed the statement admitting he hit plaintiff "while she was crossing the street with the green light and in the pedestrian walkway" and since medical reports indicated plaintiff had sustained a "tibial plateau fracture."

"Broad equitable considerations," it has often been said, govern section 72 petitions and since "considerable discretion" is vested in the court which hears the petition, the reviewing court "will reverse only upon a clear showing of abuse of discretion." The leading cases are well known and often discussed. Esczuk v. Chicago Transit Authority, 39 Ill.2d 464, 468-469, 236 N.E.2d 719; Fennema v. Vander Aa, 42 Ill.2d 309, 247 N.E.2d 409; Park Avenue Lumber and Supply Co. v. Hofverberg, 76 Ill.App. 2d 334, 347-348, 222 N.E.2d 49; Elfman v. Evanston Bus Co., 27 Ill.2d 609, 613, 130 N.E.2d 348; Ellman v. De Ruiter, 412 Ill. 285. While this case involves the presence of an insurance carrier and its attorney, any resulting liability between the defendant, the insurer or the attorney, as among themselves, is not relevant here. Chmielewski v. Marich, 2 Ill.2d 568, 119 N.E.2d 247; Burkitt v. Downey, 102 Ill.App.2d 373, 242 N.E.2d 901. While these cases involved defendants who did nothing more than forward a copy of the summons and complaint to an

insurance carrier, it is clear that section 72 relief depends upon a consideration of all the circumstances.

Thus, the facts in the instant case are distinguishable from Chmielewski and similar cases in that the course of conduct of the defendant, here, when considered along with all the attendant circumstances, was not of such a character as would reasonably have led the plaintiff and the court to believe he did not wish to contest the suit. There were other circumstances present in this case, in addition to the conduct of the defendant, that would make any belief that the defendant did not wish to contest the law suit an unreasonable belief. The relevant circumstances included the following: 1) plaintiff's counsel did not give defendant any notice, however informal, that it intended to obtain a default judgment; 2) more importantly, plaintiff gave defendant no notice that a default was entered on October 6 and damages would be proved up October 13; 3) plaintiff knew an insurance company was in the case and had forwarded to the insurer notice of defendant attorney's lien but provided the insurer no notice of the steps it proposed to take; 4) defendant, through his counsel, took positive action by appearing and by filing an answer on October 22 and sent plaintiff notice of its intention to do so on October 14; although plaintiff denied ever having received the notice, it is not disputed that it was sent on October 14 and filed on October 22; 5) defendant waited until after thirty days had expired before filing his garnishment; 6) this was a personal injury action where the police report indicated the nature of the injuries to be "bruises on the left knee" but $35,000 in damages was awarded; 7) when actual notice of the default judgment was received through the service of the garnishment summons on November 18, 1971, defendant filed his section 72 petition December 6; 8) the reason to explain the defendant's conduct was "difficulties" encountered by the law clerk of defendant's counsel in locating the court file to verify the service of summons and return date.

Consequently, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

PER CURIAM

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. |
| v. | ) | HONORABLE ARTHUR V. ZELEZINSKI, PRESIDING. |
| ALBERT WHITE, Defendant-Appellant. | ) | |

MR. JUSTICE McNAMARA delivered the opinion of the court:

After a bench trial defendant was found guilty of theft and sentenced to the maximum term of one year in jail. The sole issue on appeal is the propriety of that sentence. Defendant contends that, instead of sentencing him, the trial court should have invoked the treatment provisions of the Dangerous Drug Abuse Act, Ill.Rev.Stat. 1969, ch.91-1/2,par.120.10, which would have allowed defendant to receive treatment under the supervision of the Illinois Department of Public Health.

At the hearing in aggravation, the State introduced defendant's prior criminal record, going back to 1961 and consisting of eight convictions. In mitigation, the defendant informed the court that he was 33, married, had six children, was unemployed, and addicted since 1957.

The "Dangerous Drug Abuse Act" declares that it is "imperative that a comprehensive program be established and implemented *** to provide diagnosis, treatment, care and rehabilitation for drug addicts, to the end that these unfortunate individuals may be restored to good health and again become useful citizens in the community." Ill.Rev.Stat. 1969, ch.91-1/2,par.120.2.

The terms of the Act set up a detailed, step-by-step procedure for establishing an orderly inter-connection between the criminal justice system and the treatment facilities of the Illinois Department of Mental Health. The Act requires the trial court to admonish the accused that, among other conditions, the alternative course of treatment may involve confinement to a mental hospital and a violation of probation for failure to adhere to the treatment program. The procedure

is not automatic. If the defendant elects to undergo treatment, the court must order an examination by the Department of Mental Health to determine whether he is an addict and likely to be rehabilitated by treatment. Thereafter the Department submits its report and recommendations to the court, and the court, "acting on the report and other information coming to its attention," determines whether the defendant is an addict and likely to be rehabilitated. If it so determines, the court may place the defendant on probation under the supervision of the Department of Mental Health.

Defendant initially urges that he in fact requested the treatment for which he was eligible and the trial court ignored his request and clearly abused its discretion in failing to take into consideration that the defendant was in need of treatment, not incarceration. Defendant argues further that, if it could be held that he made no request for treatment, the trial court on its own motion should have invoked the treatment provisions of the Act and committed him to the Department of Mental Health for treatment.

As to defendant's initial contention that he requested treatment under the Act, the factual basis consists solely of the following exchange during the hearing in mitigation:

DEFENSE COUNSEL: Do you want to get on a program?

DEFENDANT: Yes, sir.

Nothing in the Act supports a view than an election by a defendant to enter the program could be taken lightly. We therefore believe that something more than the above brief comment was required to exercise the "election" contemplated by the Act. Defendant's answer to his counsel's leading and general question did not indicate that he had considered or even contemplated such an election. It is difficult to imagine any individual embarking on such a serious course of action, including as it did, a compulsory psychiatric examination and perhaps months of confinement in a mental hospital, without expressing his intention to do so clearly and unequivocally. We conclude that the defendant did not

make an election or request to undergo treatment under the terms of the Dangerous Drug Abuse Act.

Defendant, however, argues that, even if he failed to make a request for treatment under the Act, the trial court on its own motion should have invoked the Act's provisions and certified him for treatment by the Department of Mental Health. Indeed, defendant urges that such certification was mandatory upon the trial court under the facts and circumstances.

The Act provides that "the court may certify an individual for treatment *** regardless of the election of the individual." (emphasis added) Ill.Rev.Stat. 1969, ch.91-1/2,par.120.10. In People v. Williams, 4 Ill.App.3d 362, 280 N.E.2d 798, this court held that the initiation of the certification process by ordering an examination of defendant by the Department of Mental Health is not mandatory upon the trial court. That decision accurately reflects the clear expression of the Act, stating, as it does, that the court "may" order such an examination. Had the legislature wished to make the procedure mandatory, it could easily have done so by use of the word "shall" instead of "may." In our view, the legislative intent is clearly manifested. Schmidt v. Powell, 4 Ill.App.3d 34, 280 N.E.2d 236. The provision in question provides an additional alternative for the trial judge in appropriate cases, but is not a compulsory one. We recognize that there might be circumstances that would require the court to initiate the Act's procedure, but such facts are not present here.

The court properly exercised its discretion in sentencing defendant to jail rather than invoking the certification procedures of the Dangerous Drug Abuse Act. Accordingly, the judgment of the circuit court is affirmed.

Judgment affirmed.

DEMPSEY, P.J., and McGLOON, J., concur.

56514

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| BEN ANDERSON, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT |
| | ) | |
| v. | ) | COURT OF COOK COUNTY. |
| | ) | |
| SAFEWAY INSURANCE COMPANY, | ) | Hon. Edward J. Egan, |
| | ) | Presiding. |
| Defendant-Appellant. | ) | |

PER CURIAM:

An application was filed by plaintiff pursuant to the provisions of the Uniform Arbitration Act to compel defendant to arbitrate a claim made against it pursuant to an uninsured motorists provision contained in an automobile insurance policy issued by defendant to plaintiff. (Ill.Rev.Stat. 1969, ch.10, par.101 et seq.) Two orders were entered by the trial court, one order requiring defendant to proceed with arbitration, requiring the parties to designate a third arbitrator, finding that defendant was estopped from asserting the defense of no coverage and reserving jurisdiction in the trial court until "final determination hereof," and the second order (entered at a later date) appointing a third arbitrator. Defendant has appealed both orders, contending on appeal that the trial court was in error in holding it was estopped from asserting the defense of no coverage and in ordering it to proceed with the arbitration.

Defendant issued plaintiff an automobile insurance policy on June 18, 1969, the policy containing, inter alia, standard provisions relating to uninsured motorists coverage and to arbitration to settle matters in the event the defendant and the insured were unable to agree upon the resolution of a claim filed under the uninsured motorists provision. It appears from the record that ten days later plaintiff was involved in an automobile accident with a person named Johnny Govan, whom the plaintiff claimed was uninsured at the time.

It further appears that on or about September 1, 1970, plaintiff's counsel was advised by the defendant's claims manager that plaintiff lacked "satisfactory proof" of Govan's uninsured status and that on that date plaintiff's counsel mailed to

defendant, in care of its claims manager, certain correspondence received from the Department of Public Works and the Secretary of State's Office relative to the "suspension of registration and driving privileges of the parties charged." Thereafter, a letter dated September 3, 1970, was received by plaintiff's counsel from defendant's claims manager acknowledging receipt of plaintiff's claim, requesting that plaintiff set up appointments with a designated physician and with its attorneys for a sworn oral and a physical examination, and advising that defendant had designated an arbitrator and that enclosed with the letter were proof of uninsured motorists claim forms to be completed and returned by plaintiff. It appears that plaintiff complied with all the terms set out in the letter within the next two months or so, and that he apparently also filed a form relating to the expenses which he incurred as a result of the accident.

On January 26, 1971, plaintiff filed the instant Application to Compel Arbitration, defendant answered and a hearing was held thereon at which the foregoing matters were adduced. After the hearing the trial court allowed plaintiff to file an Amended Application, wherein grounds were alleged and it was requested that defendant be estopped from advancing the defense of no coverage for reason of the alleged lack of proof of Govan's uninsured status. Defendant was allowed to answer the Amended Application, and after a hearing was held thereon, the Amended Application was allowed, defendant was estopped from advancing the defense of no coverage, and the parties were ordered to proceed with the arbitration.

Defendant's first contention, that the trial court erred in holding it estopped from denying coverage, is unavailing. Defendant argues first in this regard that since the question of coverage is "jurisdictional" and therefore a matter of law, it cannot be estopped from denying coverage because a mistake of law cannot give rise to an estoppel. While the matter of coverage may be jurisdictional, it is so by virtue of the contract between the parties whereby they agreed to put to arbitration the matters of liability and damages, but not the

matter of coverage. The trial court did possess the jurisdiction to determine the question of coverage, but, without more, plaintiff had no way of knowing whether the court would be called upon to exercise the jurisdiction without the question being seasonably put into issue by the defendant.

The "jurisdictional" nature of the question of coverage here is wholly unlike the jurisdictional question presented in the case cited by defendant in support of this argument, Holcomb v. Boynton, 151 Ill. 294, 37 N.E. 1031. The Holcomb case involved a situation where the jurisdiction of a court was repealed while a matter pending before it had not yet come to finality; pursuance of that matter thereafter in the court did not estop that party from later challenging the outcome as void. To uphold defendant's position in the instant case would give it the distinct, unfair advantage of being allowed to lie in wait for an unsuspecting insured and then to refuse payment on the grounds of an alleged (non-mutual) mistake of law, and, significantly, the "mistake of law" which defendant is said to have made is nowhere identified by it.

The defendant also argues in this connection that the facts of the case do not support the finding of estoppel. We disagree.

A person may be estopped to assert rights otherwise accruing to him where his voluntary conduct has been such as to have caused another party, against whom those rights are sought to be asserted, to have relied upon such conduct and to have altered his position for the worse, thereby acquiring a corresponding right. Artnell Company v. National Broadcasting Co., 4 Ill.App. 2d 970, 282 N.E.2d 493.

As noted above, plaintiff's counsel was advised by defendant's claims manager that plaintiff lacked "satisfactory proof" of Govan's uninsured status. To remedy that situation plaintiff's counsel forwarded certain matters to defendant. The record does not disclose that defendant considered those proofs unsatisfactory, or that it so advised plaintiff or his counsel. On the contrary, defendant's claims manager thereafter informed plaintiff's counsel that plaintiff would have to perform certain acts and complete certain forms, with which plaintiff complied. The defendant's act of informing plaintiff's counsel that

defendant had designated its arbitrator could well have lulled plaintiff into the belief that defendant intended to arbitrate those matters called for by the insurance contract, namely, damages and liability, and that coverage (Govan's uninsured status) would not be challenged. (See Flood v. Country Mutual Ins. Co., 41 Ill.2d 91, 242 N.E.2d 149.) The trial court properly held that defendant, by its acts and plaintiff's reliance thereon, was estopped from denying coverage in this matter.

With regard to the contention that the trial court erred in ordering the parties to proceed with arbitration, it follows as a logical conclusion from the disposition of the defendant's first contention that the court was correct in its ruling since arbitration of certain issues was part of the parties' contract. It also follows that the court was correct in appointing the third arbitrator, since that too was within the terms of the contract.

For the foregoing reasons the orders appealed from are affirmed.

Orders affirmed.

PER CURIAM

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | |
| Respondent-Appellee, | ) | APPEAL FROM THE CIRCUIT |
| | ) | |
| v. | ) | COURT OF COOK COUNTY. |
| | ) | |
| ERNEST RAMEY, | ) | Hon. Jacques F. Heilingoeter, |
| | ) | Presiding. |
| Petitioner-Appellant. | ) | |

PER CURIAM:

Ernest Ramey, hereafter called petitioner, and James Carter were originally found guilty at a joint trial of armed robbery, aggravated battery and attempt rape. The petitioner was sentenced to concurrent terms of twenty to forty years, eight to ten years and five to ten years in the Illinois State Penitentiary. Petitioner appealed to this court which affirmed the judgment of conviction. (People v. Ramey, 115 Ill.App.2d 431, 255 N.E.2d 688) On August 15, 1968, petitioner filed a pro se petition pursuant to the Illinois Post Conviction Hearing Act alleging a violation of his constitutional rights at trial. (Ill.Rev.Stat. 1967, ch.38, par.122-1 et seq.) The public defender was appointed to represent the petitioner and after conferring with him filed an amended post-conviction petition. On motion of the State, the amended post-conviction petition was dismissed without an evidentiary hearing. The petitioner appealed to the Illinois Supreme Court which subsequently transferred the cause to this court.

The amended post-conviction petition alleged two violations of the petitioner's constitutional rights. First, the petition alleged that certain items taken from Carter's house were illegally seized and improperly admitted into evidence against the petitioner. Secondly, the petition alleged that the petitioner's out-of-court identification was so suggestive as to deny him due process of law.

As stated, petitioner appealed his conviction to this court. There he argued that the trial court erred in admitting into evidence certain items illegally seized from Carter's home. In affirming the conviction, we refused to consider this argument since it was not raised in the trial court (115 Ill.App.2d 431).

The petitioner now argues that the original transcript of the trial, which was not made part of this record on appeal, demonstrates that the petitioner's counsel orally joined in the co-defendant's motion to suppress. This argument is contradicted by our consideration of the petitioner's direct appeal where the trial transcript was before this court and by the statements of petitioner's counsel at the motion to dismiss the post-conviction petition where he admitted that the petitioner's original trial counsel did not orally join in the motion to suppress.

A proceeding under the Post Conviction Hearing Act is a new proceeding for the purpose of inquiring into the constitutional phases of the original conviction which have not already been adjudicated. People v. Derengowski, 44 Ill.2d 476, 248 N.E.2d 103. Where an allegation has previously been considered and rejected by this court, any reconsideration of the same allegation in a post-conviction proceeding is barred by the doctrine of res judicata. People v. Westbrook, 5 Ill.App.3d 970, 284 N.E.2d 695. Measured by these standards, we find that the trial court properly concluded that an evidentiary hearing was not required on this allegation. We also note that the petitioner's co-defendant, Carter, later appealed his conviction to this court. There we upheld the search of Carter's house and the seizure of items taken therefrom which were introduced into evidence against the petitioner in the case at bar. People v. Carter, --Ill.App.2d--, 270 N.E.2d 603.

Petitioner's second allegation of a denial of his constitutional rights is that the procedure used in obtaining his identification was so suggestive as to deny him due process of law. The petitioner was first identified by photograph and after his arrest was identified by the complainant in her hospital room. It is not within the view of the Post-Conviction Hearing Act to have claims determined which could have been presented upon a direct appeal of the conviction. People v. Doherty, 36 Ill.2d 286, 222 N.E.2d 501. Where a direct appeal is taken, as in the case at bar, the judgment of the reviewing

court is res judicata not only as to all issues actually raised, but also as to those issues which could have been raised but were not, the latter issues being deemed to have been waived. People v. Kamsler, 40 Ill.2d 532, 240 N.E.2d 590. In the case at bar, the petitioner's argument as to the suggestiveness of his identification was rendered res judicata by the decision in his direct appeal.

Petitioner also argues that res judicata should not be mechanically applied. We have carefully examined petitioner's arguments and they are not such as to raise them to the status of a "special circumstances" as in the cases cited by petitioner. People v. Williams, 36 Ill.2d 194, 222 N.E.2d 321; People v. Moore, --Ill.App.3d--, --N.E.2d--, (No. 57152, decided January 11, 1973).

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

PER CURIAM

56213

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| GUY THOMAS, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT |
| Plaintiff-Appellant, | ) | OF COOK COUNTY. |
| | ) | |
| v. | ) | |
| | ) | |
| PAUL W. PRETZEL, as Executor of the Estate of HELEN M. NORRIS, deceased, et al., | ) | |
| | ) | HONORABLE |
| | ) | CHARLES R. BARRETT, |
| Defendants-Appellees. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

On November 13, 1970, the plaintiff filed a complaint in chancery for specific performance of an oral contract to make a will and for an accounting. The affidavit attached to the complaint was signed by the attorney and duly authorized agent of the plaintiff. The defendants filed a motion to dismiss. On February 5, 1971, the plaintiff, with leave of court, filed an amended complaint to which the executor of the estate filed an amended motion to dismiss. On June 8, 1971, the trial court entered an order dismissing the complaint and amended complaint as well as the counterclaim of the heirs at law. The plaintiff is the only party who has perfected an appeal.

In his amended complaint the plaintiff alleged in Count I that Helen M. Norris died testate on April 8, 1970, leaving her surviving Nora Blotteaux, a sister, and Raymond Marsh, a brother, as her only heirs at law and next of kin; that letters of administration were issued on April 15, 1970, to Bernard W. Mages; that subsequently, on July 23, 1970, letters testamentary were issued upon the purported will to Paul W. Pretzel, as executor; and that St. Ethelreda Parish, Father Flanagan's Boys Town and The Society of the Little Flower were named legatees and devisees.

The amended complaint further alleged that the plaintiff was a bachelor and Helen M. Norris was a widow; that the decedent and the plaintiff met prior to 1963 and became very close friends;

that in 1963 the decedent asked the plaintiff to move into her apartment to take care of her and to provide companionship, help, assistance and financial advice to her and she did then and there and on various other occasions promise that if the plaintiff would do so she would leave a will leaving all of her property to the plaintiff. The plaintiff further alleged that in reliance upon the said promises and agreement and pursuant thereto the plaintiff moved into decedent's apartment and did for a long period of time and up to the time of her death provide for, take care of, assist and help and provide companionship for the decedent; that they were inseparable and made plans to marry and would have in fact culminated their relationship in marriage except that decedent died before the marriage ceremony could take place; that, as an additional consideration for the promise and contract of Helen M. Norris to make a will, leaving all of her property to the plaintiff, the parties agreed and plaintiff undertook not to date or seek the company of other women; and that the plaintiff kept his promise.

The plaintiff further alleged he performed all his promises and undertakings and was unaware of the fact that Helen M. Norris had executed a will in 1962; and that he fully relied on her promise to make a will leaving everything to him.

The plaintiff, in Count II of the amended complaint, alleged that on January 26, 1970, Helen M. Norris became gravely ill and it became necessary for her to enter into a hospital for a series of treatments and that, not knowing whether she would recover, executed the following handwritten document:

> To All Whom It May Concern:
>
> > I wish my fiancé Mr. Guy Thomas (without interference from anyone) is to come in possession of all that I own (In case anything happens to me). Sudden illness has prompted this request. This also means any Will is obsolete.

Sound of mind and not forced by anyone.

Will enter Hospital 1/27/70. This is written 1/26/70.

Helen M. Norris

The plaintiff further alleged the document of January 26, 1970, was in fact a will, was supported by a good and valuable consideration, and was executed by the decedent pursuant to the oral contract to make a will in favor of the plaintiff. The plaintiff alleged further that Helen M. Norris never did recover from her illness and passed away on April 8, 1970.

Nora Blotteaux and Raymond Marsh, decedent's sister and brother and only surviving heirs at law, filed a counterclaim in which they alleged that Helen M. Norris, on January 26, 1970, looked for her will and being unable to find it executed a memorandum reciting that her will was obsolete; that decedent was not certain she had executed an effective will, and in view of her then fatal illness, did not remember that Paul W. Pretzel had custody of her will, otherwise she would have called for said will and destroyed the same; and that the document dated January 26, 1970, is an ineffective attempt to effectuate a gift causa mortis because there was no parting with possession and title as to personal property and a gift of real property is contrary to law. The trial court was asked to decree that the deceased died intestate and that the proceedings in the probate estate were void.

On April 5, 1971, Paul W. Pretzel, Executor of the Estate of Helen M. Norris, deceased, filed an amended motion to dismiss the amended complaint, alleging that the amended complaint was filed after the expiration of the seven month claim period; that the amended complaint did not relate back to the time of filing the original complaint since the verification of the original complaint was by plaintiff's attorney who had no personal knowledge of the facts; and that the alleged written revocation of

the will of the deceased is invalid because it fails to meet the requirements of Section 46 of the Probate Act.

The deposition of the attorney for the plaintiff was taken and filed of record. At the deposition the following question was asked and the following answer given:

> Q. Do you have any personal knowledge of the facts alleged in the complaint?
>
> A. Other than what Guy Thomas told me, no.

On motion of the executor the trial court, on June 8, 1971, entered an order dismissing the amended complaint and the counterclaim and, further, dismissed the cause of action at plaintiff's costs.

The defendant argues that "a claim based upon breach of an alleged contract to make a will is within the claim jurisdiction"of the Probate Act; and that under Section 192 of said Act (Ill. Rev. Stat. 1971, ch. 3, par. 192) such claim must be accompanied by an affidavit of the claimant, or a person having knowledge of the facts. Here the complaint was accompanied by an affidavit of the attorney for the plaintiff who stated in a deposition that the only knowledge he had of the facts was that which was told to him by the plaintiff. Therefore, the defendant argues the original complaint, as filed on November 13, 1970, is ineffective because it did not comply with Section 192 and, consequently, the amended complaint filed on February 5, 1971, was not filed in apt time because the seven month period after issuance of letters of administration on April 15, 1970, expired on November 15, 1970 (Ill. Rev. Stat. 1971, ch. 3, par. 204).

Section 5 of the Probate Act (Ill. Rev. Stat. 1971, ch 3, par. 5) provides that the provisions of the Civil Practice Act shall apply to all proceedings under the Probate Act with a few exceptions not pertinent here. Therefore, under the provisions

of Section 46(2) of the Civil Practice Act (Ill. Rev. Stat. 1971, ch. 110, par. 46(2)) if the cause of action in an amended complaint grows out of the same transaction, it relates back to the date of the filing of the original complaint. Krunfus v. Winkelhake (1963), 44 Ill. App.2d 124, 194 N.E.2d 24.

The alleged irregularity in the original complaint was never passed upon by the court and the amended complaint was filed by leave of court. Since it grew out of the same transaction, it properly relates back to the time of filing of the original complaint. In Metropolitan Tr. Co. v. Bowman Dairy Co., 369 Ill. 222, 229, 15 N.E.2d 838, the court held:

> Briefly summarized, section 46 permits any amendment of a pleading, filed in apt time, after the time limited for commencing suit to set up a cause of action on any claim which was intended to be brought by the original pleading, provided, only, that it grew out of the same transaction or occurrence, and it is not necessary that the original pleading technically state a cause of action, or that a cause of action set out in the amendment be substantially the same as any cause of action stated in the original pleading. [Emphasis supplied.]

Since the original complaint was filed within the seven month period prescribed by Section 204 of the Probate Act (Ill. Rev. Stat. 1971, ch. 3, par. 204), defendants' contention that the suit is barred is without merit. See In Re Estate of Schafer, 344 Ill. App. 608, 101 N.E.2d 853.

Plaintiff urges that he is not asserting a claim but an action to enforce a contract to make a will which under Section 28 of the Limitations Act (Ill. Rev. Stat., ch. 83, par. 24(e)) shall be commenced within the time set for filing claims; that therefore compliance with Par. 192 and Par. 204 of the Probate Act relating to claims is unnecessary. We agree. See Willison v. Stoutin, 4 Ill. App.3d 490, 280 N.E.2d 564, and Greenwood v. Commercial National Bank of Peoria, 7 Ill.2d 436, 130 N.E.2d 753.

However, whether the instant proceeding is considered a claim or an action under Section 28 of the Limitations Act, Par. 46(2) of the Practice Act applies and the amended complaint relates back to the filing of the original complaint which was duly filed in proper time.

Plaintiff next contends that his complaint stated a cause of action and that the court erred in dismissing it on motion of defendant. All facts well pleaded in the complaint are taken as true on a motion to dismiss. Newberg Const. Co. v. Fischbach, etc., Inc., 46 Ill. App.2d 238, 196 N.E.2d 513. See also In Re Estate of Amschl, 104 Ill. App.2d 40, 243 N.E.2d 547.

In the instant case it is alleged in Count I that there was an oral agreement between the plaintiff and Helen M. Norris whereby the plaintiff, at the request of Helen M. Norris, moved into her apartment to take care of her, provide companionship, help and assist her, and the said Helen M. Norris promised that if he would do so, she would make a will leaving all of her property to him. It is further alleged that the plaintiff, in reliance upon said promise, did move into the apartment of Helen M. Norris, did from then to the time of her death provide for, take care of, assist and help and provide companionship for the said Helen M. Norris. These allegations, together with the other allegations of the amended complaint, set forth in Count I cause of action for specific performance of an oral contract to make a will. Anson v. Haywood, 397 Ill. 370, 74 N.E.2d 489.

The cases cited by the defendant involved the question of whether, after presentation of evidence, the allegations of the complaint were proved. None involved a motion to dismiss where the sole question was whether the complaint stated a cause of action.

As to Count II plaintiff concedes in his brief that the

written statement of decedent incorporated therein is not a valid will nor is it a proper revocation of the prior will under Section 46 of the Probate Act (Ill. Rev. Stat. 1971, ch. 3, par. 46). Therefore Count II should be stricken and dismissed.

The judgment dismissing the complaint is reversed and the cause remanded for further proceedings not inconsistent with this opinion as to Count I and with directions to dismiss Count II.

JUDGMENT REVERSED AND REMANDED
WITH DIRECTIONS.

Abstract only.

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |
| | ) | |
| EDDIE L. DAVIS, | ) | HONORABLE |
| | ) | JOHN J. MORAN, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was charged with reckless conduct and unlawful possession of a firearm, in violation of sections 12-5 and 83-2 of the Criminal Code. Ill.Rev.Stat. 1971, ch. 38, pars. 12-5 and 83-2. After a bench trial, the defendant was found guilty of both charges. He was sentenced to serve 90 days in the House of Correction on the charge of reckless conduct and was placed on probation for a period of one year on the charge of unlawful possession of a firearm. On appeal, the defendant argues that he was not proven guilty beyond a reasonable doubt because his identification by the complainant was doubtful and uncertain and that his motion to suppress the evidence seized from his person should have been granted, since his arrest was illegal and the gun which was seized was a product of the illegal arrest.

The facts as adduced at the motion to suppress and the trial follow: Robert Douglas testified that on February 28, 1971, at approximately 4:30 P.M., he was at his home at 320 N. Francisco in Chicago, Illinois. As he left his home, he observed the defendant and the defendant's nephew walking on the other side of the street. At this time the defendant was approximately 75 feet away. Mr. Douglas testified that he did not know the defendant but did know the defendant's nephew,

who had previously had a fight with Mr. Douglas' son, over which Mr. Douglas had called the police. As Mr. Douglas walked toward his car, which was parked in front of his home, he observed the defendant start crossing the street and walking in his direction. The defendant then pulled a gun from his belt and fired two shots at Mr. Douglas. Mr. Douglas ducked behind the car and the shots hit his home. The defendant then fled.

Officer Wilke, a Chicago police officer, testified that on February 28, 1971, at approximately 4:30 P.M., he responded to a call and proceeded to 320 N. Francisco in Chicago, Illinois. He recovered two spent .45-caliber shells from the middle of the street at that address. After conferring with Mr. Douglas, Officer Wilke took him in the squad car on a tour of the area to see if they could apprehend the offender. Mr. Douglas identified the defendant as he was walking down the street. Officer Wilke then placed the defendant under arrest. In searching the defendant, Officer Wilke discovered a .45-caliber automatic with five rounds of live ammunition. The ammunition was of the same manufacture and caliber as the two expended shells found at the scene of the shooting. The gun had been recently fired.

The defendant testified that on February 28, 1971, he was at his sister-in-law's home which is right around the corner from Mr. Douglas' home. The defendant and his nephew left the house walking on the opposite side of the street from Mr. Douglas' home. At this time, three men came out of Mr. Douglas' house, one armed with a revolver and another with a shotgun. The men began to shoot at the defendant and his nephew and they ran back into the sister-in-law's home. After waiting for a short period of time, the defendant and his nephew again left the house and were subsequently arrested as they walked down the street. The defendant denied shooting at Mr. Douglas and testified that, when arrested, his gun had seven live cartridges.

Susie Davis, the defendant's wife, testified that on February 28, 1971, she went with her husband to her sister's home. The defendant and her nephew left the home and started to walk down the street. At this time, several men came out of Mr. Douglas' home and began shooting at the defendant. One man was armed with a shotgun and the second with a revolver. She testified that the defendant fired no shots and that Mr. Douglas was not one of the men shooting at her husband.

The defendant first argues that his identification by Mr. Douglas was doubtful and uncertain. The defendant bases his argument upon five factors: (1) that Mr. Douglas did not know the defendant prior to the shooting; (2) that Mr. Douglas was 75 feet away from the defendant at the time of the incident; (3) that Mr. Douglas did not have a sufficient opportunity to observe the offender; (4) that Mr. Douglas identified the defendant from the back seat of a squad car one half block away; and (5) that the alleged incident took place on a winter evening at 4:30 P.M. and it must be assumed that it was dark at this time.

The prosecution has the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. Where the identification of the defendant is doubtful or uncertain, the prosecution has not met its burden of proof and the decision must be reversed. People v. Bennett, ____ Ill.App.3d _____, ____ N.E.2d ____ (No. 56234, decided January 26, 1973). However, an identification by one witness to a crime can be sufficient to justify a conviction even where contradicted by the defendant. People v. Kerbeck, 362 Ill. 251, 199 N.E. 789. The credibility of witnesses and the weight to be given their testimony are normally questions for the trier of fact, and his decision will not be reversed on appeal unless it is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. People v. Clark, 52 Ill.2d 374, 288 N.E.2d 363.

In the case at bar, the testimony of Mr. Douglas was positive and credible. Mr. Douglas testified that upon leaving his home, he observed the defendant and the defendant's nephew walking on the other side of the street, approximately 75 feet away. As Mr. Douglas approached his automobile, which was parked in front of his home, he observed the defendant start walking across the street toward him. The defendant, when he was in the street, pulled a gun from his belt and fired two shots at Mr. Douglas. At this point in time, the defendant was much closer to Mr. Douglas than 75 feet. Officer Wilke's testimony demonstrates that the expended shell casings were found in the middle of the street. It was only when the defendant was in the middle of the street and pulled a gun that Mr. Douglas ducked behind a car to avoid being shot. Mr. Douglas had a sufficient opportunity to observe the defendant as he left his house and walked toward his automobile and as the defendant approached him prior to pulling the gun. People v. Bennett, ____ Ill.App.3d ____, _____ N.E.2d ____ (No. 56234, decided January 26, 1973). The fact that Mr. Douglas identified the defendant from the back seat of a squad car only a short time after the shooting does not render the identification doubtful. There is nothing improper about this procedure. People v. Elam, 50 Ill.2d 214, 278 N.E.2d 76. The defense argument that it must have been dark out at the time of the incident is not borne out by the record. No witness was specifically asked exactly what the lighting conditions were at the time of the incident. However, Mr. Douglas testified that the incident occurred in late afternoon at approximately 4:30 P.M. and that he was clearly able to see the defendant. When asked if it was possible that he could be mistaken about his identification, Mr. Douglas replied, "No, it isn't." The testimony of Mr. Douglas is clear, convincing, and is sufficient to sustain the defendant's conviction.

Moreover, Mr. Douglas' testimony is corroborated by other evidence in the case. Officer Wilke testified that at the scene of the shooting he found two expended .45-caliber shells in the street (at the general location from which Mr. Douglas had testified that the shots had been fired by defendant), and that when he arrested the defendant, the defendant had in his possession a .45-caliber automatic with only five rounds of ammunition. The ammunition in the defendant's gun was of the same caliber and manufacture as the two expended shells found at the scene of the shooting. The gun had been recently fired. The defendant himself admitted that he was at the scene of the shooting with his nephew. The defendant was proven guilty beyond a reasonable doubt.

The defendant's second argument is that the motion to suppress the evidence found on his person should have been granted since his arrest was illegal and all evidence seized from his person was a product of that illegal arrest. An officer is justified in making an arrest without a warrant when he reasonably believes an offense has been committed and that the person whom he seeks to arrest is the offender. People v. Wilson, 45 Ill.2d 581, 262 N.E.2d 441. A police officer has the right to rely upon information concerning the commission of a crime when furnished him by an ordinary citizen without any showing of prior reliability. People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466.

In the case at bar, Officer Wilke was furnished information that a crime had been committed, i.e., that Mr. Douglas had been shot at. He found corroboration for this when he discovered the two expended .45-caliber shells in the middle of the street where the shooting occurred. Officer Wilke properly took Mr. Douglas on a tour of the area in order to attempt to apprehend the offender quickly. The police procedure of taking a witness on a tour of the

area in an attempt to get a prompt on-the-scene identification is common in the apprehension of criminal offenders and is a perfectly proper means of quickly apprehending an offender. People v. Elam, 50 Ill.2d 214, 278 N.E.2d 76. Upon Mr. Douglas' identification of the defendant, Officer Wilke was justified in placing the defendant under arrest and thereafter searching him. People v. Durr, 28 Ill.2d 308, 192 N.E.2d 379. In the case at bar, the defendant's arrest and subsequent search of his person were lawful. The defendant's motion to suppress was properly denied.

The judgment is affirmed.

JUDGMENT AFFIRMED.

(Publish abstract only.)

No. 56755

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| PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY |
| vs. | ) | |
| JEROME HARRIS, Petitioner-Appellant. | ) | HONORABLE FRANK J. WILSON, PRESIDING. |

PER CURIAM (Fifth Division, First District):

Jerome Harris, hereinafter called defendant, was indicted for the offense of murder. (Ill. Rev. Stat., 1967, ch.38, sec.9-1.) After pleading guilty to a reduced charge of voluntary manslaughter (Ill. Rev. Stat., 1967, ch. 38, sec.9-2) he was sentenced to a term of two to six years. Thereafter, defendant filed a petition under the Post-Conviction Hearing Act alleging a violation of his constitutional rights. The attorney appointed to represent him filed an amended post-conviction petition which on motion of the State was stricken without an evidentiary hearing. Defendant then appealed to the Supreme Court which transferred the case here.

On appeal, the defendant argues that the trial court erred in dismissing his amended post-conviction petition without an evidentiary hearing because his allegations of coercion and incompetence of counsel raised serious constitutional questions and required a hearing under the Post-Conviction Hearing Act. Ill. Rev. Stat., 1967, ch.38, sec. 122-1 et seq.

The defendant, in his amended post-conviction petition, alleged that his plea of guilty was coerced when he was told by the public defender that if he did not enter a plea of guilty to voluntary manslaughter the State would prosecute the charge of murder and he could be given the death penalty. In People v. Brown (1969), 41 Ill. 2d 503, 244 N.E.2d 159, the defendant alleged that his plea of guilty was coerced when his attorney informed him that if he insisted upon a jury trial he would receive much more time in jail and possibly the death penalty. The court, in affirming the dismissal of the defendant's

post-conviction petition without a hearing, specifically held that this allegation was insufficient to require an evidentiary hearing. In the case at bar the trial court properly ruled that no evidentiary hearing was required on the defendant's allegation of coercion. The transcript of the record in this case clearly shows that his plea of guilty was voluntarily and understandingly given after the trial court had made diligent inquiry and had given adequate warning of the consequences of a plea of guilty.

The defendant's second argument is that his trial attorney was incompetent. The defendant, in his amended post-conviction petition, alleged that during his incarceration prior to his plea of guilty, he saw the public defender, Mr. Steele, for a total time of no more than ten minutes. Again the transcript of the record of the defendant's plea of guilty contradicts this allegation. At the defendant's plea of guilty, in response to a question, the defendant stated that he had in fact conferred with Mr. Gerald Getty, who represented him at the time of his plea of not guilty prior to changing his plea. The transcript also shows that the defendant also conferred with an assistant public defender by the name of Mr. Banks. As a general rule, a motion to dismiss will be considered to accept as true all allegations of fact properly pleaded; however, when ruling upon a motion to dismiss a post-conviction petition, the trial court may render its decision not only upon the allegations of the petition, but also upon the transcript of the trial or other proceedings. People v. Morris (1969), 43 Ill.2d 124, 251 N.E.2d 202; People v. Funches, No. 56748 (1st Dist., filed December 15, 1972).

In order to require a hearing, a post-conviction petition must make a substantial showing that the defendant's constitutional rights have been violated. (People v. Ashley (1966), 34 Ill.2d 402, 216 N.E.2d 126.) Where an allegation of incompetency of trial counsel is made, in order to establish a violation of constitutional rights, the defendant must establish that he suffered substantial prejudice

from the manner in which his counsel conducted his defense. (People v. Thomas (1972), 51 Ill.2d 39, 280 N.E.2d 433.) The claim of prejudice cannot be based upon mere conjecture. In view of the defendant's failure to allege actual prejudice and the contradiction between the allegation in his post-conviction petition and the transcript of his plea of guilty, we find that the trial court acted properly when it dismissed the petition without an evidentiary hearing. People v. Smith (1968), 40 Ill.2d 562, 241 N.E.2d 413.

For the foregoing reasons the judgment of the circuit court is affirmed.

Judgment affirmed.

ABSTRACT ONLY.

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |
| | ) | |
| RALPH ADAMS, | ) | HONORABLE |
| | ) | SIDNEY A. JONES, |
| Defendant-Appellant. | ) | PRESIDING. |

MR. JUSTICE ENGLISH delivered the opinion of the court:

OFFENSE CHARGED

Rape. Ill.Rev.Stat. 1965, ch. 38, par. 11-1.

JUDGMENT

After a bench trial, defendant was found guilty of rape and sentenced to a term of two to four years.

CONTENTIONS RAISED ON APPEAL

1. Defendant was not proved guilty beyond a reasonable doubt because his identification by the victim was faulty.

2. Defendant was deprived of a fair trial due to the gross negligence of the trial judge, the state's attorney, and his own private counsel.

EVIDENCE

Brenda Jean Lindsay, for the state:

On July 5, 1967, at 6:10 a.m., she was walking on the south side of 81st Street between Maryland and Ingleside Streets on her way to her sister's home to babysit when she saw a man enter the hallway of a nearby building. As she stepped a short distance beyond that doorway, he jumped out and grabbed her. She screamed, but he held a knife to her side and told her that he would cut her throat if she screamed again. She told him that she had no money, and he replied that he didn't want money, he only wanted to have a relationship with her. He twisted her arm, took her

into an alley, and told her that they were going to walk down the alley like lovers. He said he knew she could identify him, but that she wouldn't want to get him into trouble because he had just finished serving time for rape.

They walked side by side up and down the alley several times for about half an hour. She did not see any other people in the area at that time. When they finally stopped in a gangway, he blindfolded her with a lady's scarf and had her climb up three flights of stairs. At the top of the stairs, he pushed her into a corner and unlocked a door. He led her inside and told her to sit down while he cleaned up the apartment because the kids had left their toys around. When he was through straightening up, he undressed her and told her that if she didn't help him, he would cut her throat. He kept a knife at her throat for the five to ten minutes during which they had intercourse. He returned her clothing to her one piece at a time, and when she was dressed, he grabbed her hand, unlocked the door, and took her back down to the street. Again, she did not hear any cars or people. She had been in the apartment about 20 minutes and was still wearing the blindfold which she had not taken off since he first put it on her.

He led her to the middle of the sidewalk and told her to continue walking straight ahead. She ran almost a block, and when she reached the corner, she took off the blindfold and turned around, but her assailant was gone. She ran to her sister's house which was only a block away, and arrived there at about 7:10 a.m. Her sister threatened to tell their mother that she was an hour late, and she told her sister that she had been raped. Her sister called the police, and when the officers arrived, she described her assailant as being about 5'7" tall, 150 pounds, darkskinned, with "natural" hair and a mustache. The officers first took her back to the alley and then to Billings Hospital where she was examined.

On July 21 she attended a line-up at the police station. It consisted of four male Negroes. She picked defendant out of the line-up as her assailant, and she also made an in-court identification of him.

She is 5'11" tall, and on the date in question, she was wearing shoes with two-inch heels, making her about 6'1" tall.

William Healy, for the state:

He is a police officer with the Chicago Police Department. On July 21, 1967, he arrested defendant on the second floor of the building at 8141 Maryland Street, Chicago, the immediate vicinity of the alleged rape. He was about 25 years old, 5'8" tall, dark complected, with a bushy "natural" and a thick black mustache. He took defendant to the police station, put him in a line-up with three other male Negroes, and asked Miss Lindsay if she could identify her assailant from the four men viewed. She identified defendant.

Defense counsel had defendant stand in the courtroom, and the officer identified defendant as being the same man he arrested. He again estimated defendant's height as about 5'8" tall.

STIPULATION

The report from the Crime Laboratory stated that on July 6, 1967, two vaginal smears taken from the victim at Billings Hospital were submitted and a July 7 examination of the smears revealed the presence of human spermatazoa.

Ralph Victor Adams, in his own behalf:

On July 4, 1967, he was in Detroit with his fiancee. Sometime between midnight on that date and 2:00 a.m. on July 5, 1967, he returned to Chicago, dropped off his fiancee, went to his apartment, and went to sleep. He arose late that afternoon because he was working the 4:00 p.m.-to-midnight shift at Eastman Kodak. He shared the apartment, but his roommate was not home the evening of July 4 or early the next morning.

He was arrested about three weeks to a month after July 5, 1967 and was placed in a line-up at the police station with three other men who appeared to be white derelicts. He was the only Negro in the line-up.

The first time he saw Miss Lindsay was at the police station when he was in the line-up. He did not see her in the early morning of July 5, 1967, nor did he take her to his apartment or have sexual intercourse with her on that day. He does not have children, and no children or toys were in his apartment on the morning of July 5, 1967. He has never served time for rape.

He is six feet tall, weighs 165 pounds, and was the same size on the date in question.

OPINION

Defendant argues that the 4- or 5-inch discrepancy between his actual height and Miss Lindsay's estimate of his height is so great that the victim's identification of him was discredited and he was, therefore, not proved guilty beyond a reasonable doubt.

Miss Lindsay described her assailant to the police immediately after the incident as being 5'7" tall, 150 pounds, darkskinned, with a "natural" and a mustache. About two weeks after the incident, she identified defendant from a line-up of four men, all of whom were Negroes, according to her and Officer Healy, while defendant testified that he was the only Negro in the line-up. Officer Healy estimated defendant's height at the time of his arrest and again in the courtroom as being about 5'8". Defendant testified that he was six feet tall and 165 pounds. Both at the time of his arrest and at trial, he wore a "natural" and a mustache.

Defendant urges that an 18-year-old girl who is 5'11" tall (6'1" when wearing two-inch heels, as on the occasion in question), is height conscious, and that she would definitely know whether a

man walking next to her was five inches shorter than herself. Defendant asserts, then, that since the victim's estimate should be accurate, her identification of him, five inches shorter than his actual height, must be inaccurate. During oral argument, defendant cited two cases to support the proposition that where the variance between the height described and a defendant's actual height is great enough, the victim's identification is discredited. People v. Martin, 95 Ill.App.2d 457, 238 N.E.2d 205; People v. Marshall, 74 Ill.App.2d 483, 221 N.E.2d 133.

In those cases, however, height was not the only factor involved in reversal of the convictions. In the Martin case, the discrepancy between the victim's estimate of the height of one of the two defendants and that defendant's actual height was eight or nine inches, and the victim's explanation for his erroneous estimate was unreasonable. But the court went on to say that a second discrepancy was apparent in the description of defendant as the witness had also testified that neither defendant had a mustache at the time of the crime. However, each defendant testified that he had a mustache on the date of the robbery, and both were wearing mustaches at the time of the trial, only two months after their arrest. The court held that a mustache is something that could not normally be overlooked if the witness had had a good look at their faces.

In the Marshall case, the height discrepancy was four or five inches, but there, too, the witness had failed to notice that defendant had a mustache at the time of the robbery. That court also stated that the witness' uncertainty as to whether the robber had a mustache was evidence that he did not carefully observe the robber's face.

In the instant case, Miss Lindsay, walking side by side with her assailant on a July morning, had ample time to observe the

man and, except for the height difference, her description of defendant and defendant's actual appearance match. We take note of the fact that defendant wore a "bushy natural" which would reach well above the top of his head. Both Miss Lindsay and the police officer may well have overestimated the length of defendant's hair in estimating his height as they did. It is also noteworthy that the trial judge saw both the victim and defendant in court, judging relative heights for himself, and in his opinion, the issue of height was not a determining one. In fact, being aware of the importance of the identification issue, he took especial note of defendant's appearance, and commented:

> [H]e's [Defendant's] such a distinctive fellow and you couldn't fail to identify him if you see him once. There's no way you can mix him up with anybody else, unless it's his twin: he's black, he has bushy hair, he has distinct features, he has a big mustache, he has natural hair, and the girl immediately picked him when she saw him in the line-up.

We feel, then, that the trial judge's judgment in regard to the identification of defendant is not so unsatisfactory as to justify a reasonable doubt. People v. Boney, 28 Ill.2d 505, 510, 192 N.E.2d 920, 923.

Defendant contends, next, that he did not receive a fair trial due to the negligence of the trial judge, the state's attorney, and his own counsel. He argues that he should have been measured in open court so as to determine his exact height. We have already commented on the question of defendant's height.

Defendant also argues that his defense counsel was negligent in stipulating to the admission into evidence of an inadmissible laboratory report. The report did not state when the smears were taken, but accepting the state's attorney's statement as true,

they were taken on the evening of July 5. The report stated that the smears were submitted to the police crime laboratory on the 6th and examined on the 7th. Defendant urges that the time lapses between the incident and the taking of the smears and between the time the smears were taken and their examination were great enough to make the results subject to question and, therefore, inadmissible.

We need not determine whether defense counsel was negligent in stipulating to the admission into evidence of a report which we consider to have been clearly admissible. In any event, the lengthy comment on the evidence by the trial judge made no reference to the laboratory report. He specifically stated that he believed from Miss Lindsay's testimony that she had been raped and that he accepted her identification of defendant as her assailant.

The judgment is affirmed.

A F F I R M E D.

(Publish abstract only.)

DRUCKER, P.J., and LORENZ, J., concur.

57180

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| DOETSCH BROS. CO., an Illinois corporation, | ) | Appeal from Circuit Court of Cook County. |
| Plaintiff-Appellant, | ) | |
| v. | ) | |
| BUDRON EXCAVATING CO., an Illinois corporation, | ) | Honorable Abraham W. Brussell, Presiding. |
| Defendant-Appellee. | ) | |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

On June 8, 1971, the plaintiff, Doetsch Bros. Co., secured a default judgment in the Circuit Court of Cook County in the sum of $15,081.69 and costs of suit. On October 12, 1971, the defendant, Budron Excavating Co., filed a petition to vacate the judgment under the provisions of Section 72 of the Civil Practice Act (Ill. Rev. Stat. 1971, ch. 110, par. 72) alleging that the appearance of the defendant was not filed because of the negligence of its attorney; that a large portion of the sand and gravel to be used as land fill, which was delivered by the plaintiff, was defective and unusable; and, therefore, it did not owe the plaintiff the sum of $15,081.69. On December 13, 1971, the trial court vacated the default judgment of June 8, 1971, and the plaintiff appealed.

The only issue presented on appeal is whether the trial court properly granted defendant's Section 72 petition to vacate the default judgment.

The defendant in its petition to vacate the judgment alleged that it was served with the summons on April 21, 1971; that the summons was mailed to its attorney with instructions to file an appearance and answer on behalf of the defendant; that unbeknown to the defendant the attorney negligently failed to file the appearance and answer and as a result of this negligence a default judgment was entered against the defendant on June 8, 1971, in the

sum of $15,081.69. The defendant alleged it first learned of the entry of the judgment on October 1, 1971, when Richard Miller, the President of Richard D. Miller, Inc., notified the defendant that Miller had been served with a citation to discover assets, returnable on October 7, 1971; that upon learning of the entry of the default judgment the defendant exercised due diligence and contacted the attorney by telephone and demanded that he take steps to have the judgment vacated; that defendant did not hear from the attorney and two days later again called him and sent him a letter advising him that he was to take immediate action to vacate the judgment; that despite the defendant's urgency the attorney did not take action, although he promised to do so; and that on October 7, 1971, the defendant notified the attorney that it no longer desired his services and defendant immediately thereafter retained another law firm to take steps to vacate the default judgment.

The defendant further alleged that it had a bona fide defense; that defendant, a licensed excavator, was retained by G. A. Johnson, general contractor, to fill and excavate a site at Wilke and Central Roads, Arlington Heights, Illinois, where an Eagle Food Store was being built; that in July 1970 the defendant entered into an agreement with plaintiff, who owned and operated a sand and gravel pit, to purchase "fill" in order to fill the excavation at the aforementioned site; that G. A. Johnson had the first load of material purchased by defendant from plaintiff tested by the Illinois Soil Testing Co. of River Grove, Illinois, a soil testing company; and that said material was satisfactory because the tests proved that 2,700 to 3,000 pounds of material could be compacted so as to fill one cubic yard. The defendant further alleged that the materials received from the plaintiff from July 24, 1970, through July 31, 1971,

were acceptable and defendant paid plaintiff's invoice No. 04133, dated July 31, 1971, in the amount of $3,609.90 on August 31, 1971; and that said invoice was incorrect in that three loads of eight yards each and eight loads of 14 yards each, or a total of $214.20 was improperly charged to the defendant because said material was never delivered nor received by the defendant.

The defendant further alleged that subsequent to the delivery of the material aforementioned, plaintiff issued its invoice No. 04169 dated August 31, 1970, in the amount of $16,792.60; and that the material furnished pursuant to this invoice was defective and unusable because it required 3,600 pounds of pressure to compact to fill a cubic yard, being between 600 and 900 pounds more than was contracted for; that the material was so defectively filled with silt that the general contractor required all the materials furnished by plaintiff to be removed by defendant, at its own expense, and replaced; and that defendant in fact was required to purchase new materials from the Beverly Sand and Gravel Company to fill and compact new sand materials into the aforesaid site at a cost in excess of $40,000. Defendant further alleged that in addition to the above, said invoice was incorrect because on August 5, 1970, the invoice indicates that 168 yards were sold to defendant when in fact only 154 yards were sold; that on August 19 the invoice indicates that 832 yards were sold when in fact only 772 yards were sold; that on August 20 the invoice shows that 708 yards were sold when in fact only 637 yards were sold; and that by reason thereof the defendant was overcharged an additional $226.80 for materials never received.

On November 29, 1971, the plaintiff filed an answer to the petition to vacate the default judgment. The plaintiff admitted it filed a complaint against the defendant on April 19, 1971, and that summons was served on April 21, 1971. The plaintiff

denied that the defendant received the summons and mailed the same to its attorney but said that the summons was served on the attorney as the defendant's registered agent; and that the plaintiff had insufficient knowledge to form a belief as to any information given by the defendant to its attorney and demanded strict proof thereof. Plaintiff admitted the entry of the default judgment but neither admitted nor denied any negligence by defendant's attorney and demanded strict proof thereof. Plaintiff neither admitted nor denied that the defendant used due diligence in attempting to have its attorney take steps to vacate the default judgment and that it was only after the attorney failed to act that the defendant employed other counsel to take steps to vacate the default judgment, but demanded strict proof thereof. The plaintiff admitted that it agreed to sell fill to the defendant but denied that the fill was sold for any specific purpose. Plaintiff admitted that the defendant had paid invoice No. 04133 but denied that the material delivered was defective and unusable, that the defendant had to replace the same at its own expense and that all material billed was not delivered. Plaintiff alleged that the total amount sold to defendant was $19,938.45, as set forth in exhibits attached to the complaint; that the defendant accepted said invoice and on January 26, 1971, paid $5,000 thereon, reducing the unpaid balance to the amount stated in the complaint.

The trial court vacated the default judgment upon the following conditions: (1) that defendant pay the plaintiff all costs and reasonable attorney fees incurred since the date of judgment to date of order; (2) that the defendant submit to a non-jury trial by waiving any right to demand a jury trial; (3) that the defendant provide security in the amount of the

judgment so that the lien previously existing under the judgment will not have its effect lost by the vacatur of said judgment.

The plaintiff argues that the trial court erred in vacating the default judgment entered on June 8, 1971, because the defendant's petition, filed under Section 72 of the Civil Practice Act (Ill. Rev. Stat. 1971, ch. 110, par. 72), does not show an excusable mistake or meritorious defense and, therefore, there was no equitable reason for the trial court to vacate the judgment.

A petition to set aside a default judgment under Section 72 is always addressed to the equitable powers of the trial court and only when there is an abuse of discretion will a reviewing court interfere with the decision. Stackler v. Village of Skokie, 53 Ill. App.2d 417, 203 N.E.2d 183; Kimbrough v. Sullivan, 131 Ill. App.2d 313, 315, 266 N.E.2d 717.

In Burkitt v. Downey, 102 Ill. App.2d 373, 242 N.E.2d 901, the court held that even though there may have been a lack of due diligence in presenting a defense, a default judgment may nevertheless be set aside if justice and good conscience require it.

In Elfman v. Evanston Bus Co., 27 Ill.2d 609, 190 N.E.2d 348, the court, on the equitable grounds of unfair advantage to the plaintiff, reversed an order of the trial court dismissing, on plaintiff's motion, a Section 72 petition where the defendant had sent the summons to its general counsel and a default judgment was entered as a result of the neglect of its attorney, rather than a negligent act of its own.

In Kimbrough the court affirmed the vacatur of a default judgment under Section 72 holding that defendant's reliance on someone other than himself to handle the lawsuit constituted a reasonable excuse for not having presented a defense in apt time.

In the case at bar the Section 72 petition alleged a

meritorious defense and counterclaim and a reasonable excuse for not defending in apt time: e.g., it mailed the summons to its attorney and as soon as it learned of the default judgment acted promptly.

Further, in the case at bar, although the default judgment was entered on June 8, 1971, the record does not show that an execution was ever issued, and apparently the first knowledge the defendant had of the default judgment was on October 1, 1971, when Richard D. Miller, Inc., was served with a citation.

The absence in the record of a showing that the plaintiff had an execution issue on the default judgment casts a cloud on the validity of the plaintiff's claim. Elfman at 614.

In light of the record in the case at bar, the ends of justice will be best served by a contested hearing on the merits. Riley v. Unknown Owners, 6 Ill. App.3d 864, 867, 286 N.E.2d 806.

In Lynch v. Illinois Hospital Services, Inc., 38 Ill. App.2d 470, 475, 187 N.E.2d 330, the court said:

> A default should be entered when, as a last resort, it is necessary to give the plaintiff his just demand. It should be set aside when it will not cause a hardship upon the plaintiff to go to trial on the merits.

The Lynch case was cited with approval in Libert v. Turzynski, 129 Ill. App.2d 146, 262 N.E.2d 741.

We find that the trial court did not abuse its discretion when it granted defendant's Section 72 petition and vacated the default judgment. This is especially true since the trial court, in vacating the default judgment, imposed effective conditions for the protection of the plaintiff.

The judgment of the trial court is affirmed.

AFFIRMED.

Abstract only.

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE CIRCUIT |
| Plaintiff-Appellee, | ) | COURT OF COOK COUNTY. |
| | ) | |
| vs. | ) | |
| | ) | |
| PAUL ROEBUCK, | ) | Hon. Raymond E. Trafelet, |
| | ) | Presiding. |
| Defendant-Appellant. | ) | |

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

On September 3, 1968, Paul Roebuck (defendant) was indicted for selling a narcotic. (Ill.Rev.Stat. 1969, ch.38, par.22-3.) At his request, defendant was represented by a Chicago Bar Association attorney. After a conference with the trial judge and State's Attorney the defendant entered a plea of guilty to the charge of possession of a dangerous narcotic drug and was sentenced to the penitentiary for two to four years.

Defendant appealed to the Illinois Supreme Court, which transferred the cause to this court.

On September 25, 1970, after a conference with the court and State's Attorney the defendant was admonished as to the consequences of his plea of guilty by both his counsel and the court as follows:

> "MR. COHN: Your Honor, with regards to the indictment as reduced charging possession, Attorney Frederick F. Cohn on behalf of Paul Roebuck, with Paul Roebuck present, and speaking for him, withdraws his plea of not guilty heretofore entered to the indictment generally and enters a plea of not guilty to the charge of possession of narcotic drugs in violation of the statute.
>
> Mr. Roebuck, I would like to ask you a few questions. You understand that if you desired, you could have had a jury trial in this case?

DEFENDANT ROEBUCK: Yes, I understand it all.

MR. COHN: Okay. And do you understand that you could have had a bench trial?

DEFENDANT ROEBUCK: Yes, I know that.

MR. COHN: Okay. And do you understand that you have a right to a lawyer?

DEFENDANT ROEBUCK: Yes, I understand I have a right to a lawyer.

MR. COHN: And you understand that you had a right to have people come in and testify at a hearing for you?

DEFENDANT ROEBUCK: I understand.

MR. COHN: And you had a right to subpoena witnesses?

DEFENDANT ROEBUCK: Yes.

MR. COHN: And you are pleading guilty here?

DEFENDANT ROEBUCK: Yes.

THE COURT: And you understand that by your plea that you are waiving all these rights; you completely understand that?

DEFENDANT ROEBUCK: Yes, I understand.

THE COURT: Before accepting your plea of guilty, it is my duty to advise you on, that on your plea of guilty to this indictment which charges you with possession of narcotics, you may be sent to the Penitentiary for a term of years. It may be any number of years not less than two years nor more than ten years. And knowing that, you still persist in your plea of guilty?

DEFENDANT ROEBUCK: Yes.

THE COURT: Let the record show that the defendant has been advised of the consequences of his plea of guilty not only by his counsel but by this court; and after being so advised, persists in his plea.

The plea, therefore, will be accepted."

The Assistant State's Attorney then read a stipulation of facts regarding Indictment 68-3368, charging the defendant with the crime of possession of a dangerous drug.

At a hearing in aggravation and mitigation, the defendant stated that he was a drug addict and desired to be sent to the Drug Abuse Program. Frederick F. Cohn, attorney for the defendant, stated, "that in all fairness to the State and to my client and the court, I cannot plead for any time other than what I discussed with the State"; and that "my client has a right to say anything he wishes to say." Thereupon, the court denied the motion of the defendant to be committed under the Drug Abuse Program and sentenced him to two to four years in the penitentiary.

The defendant contends that the trial court erred in not admonishing him of his right to be confronted with the witnesses against him, as required by Supreme Court Rule 402, as amended effective September 17, 1970. (Ill.Rev.Stat. 1971, ch.110A, par.402, 50 Ill.2d Rule 402.) The Illinois Supreme Court has indicated a realistic approach to the construction of the rule. (People v. Mendoza (1971), 48 Ill.2d 371, 270 N.E.2d 30.) Further, the courts have held that the rule requires only substantial compliance with its provisions. People v. Reed (1971), 3 Ill.App.3d 293, 278 N.E.2d 524; People v. Hartman (1972), 6 Ill.App.3d 543, 285 N.E.2d 600; People v. Tennyson, Illinois Appellate Court, First District, Fourth Division, No. 57061, opinion December 13, 1972.

The rule that a defendant must be warned of his right to confront the witnesses against him does not require a detailed lengthy explanation, as long as there has been substantial compliance with Rule 402. In People v. Mendoza (1971), 48 Ill.2d 371, 270 N.E.2d 30, the defendant entered a plea of guilty to theft and armed robbery. On appeal, the defendant argued that his plea was void because he was not sufficiently admonished

that by his plea he waived his privilege against self-incrimination and his right to confront his accusers. At the plea of guilty, the trial judge advised the defendant that his plea waived a jury trial and informed him of the possible penalties. The Supreme Court, in rejecting the defendant's contention, said (p. 373):

> "The record of the trial court's admonition to the defendant at the change-of-plea proceedings shows substantial compliance with our Rule 402,***."

In the case at bar, the plea was negotiated and was entered only after a conference with the court and the State's Attorney. At the change of plea proceedings the defendant, in answer to questions by his attorney, demonstrated that he understood that the charge was reduced from the sale of dangerous narcotic drugs to possession; that he understood he could have a jury trial or a bench trial; that he had a right to have a lawyer; that he had a right to have people come in and testify at a hearing for him; and that he had a right to subpoena witnesses. Defendant then entered his plea of guilty and stated, on interrogation by the court, that he understood by his plea that he was waiving all the foregoing rights. The court then advised the defendant that on his plea of guilty to the indictment, which charged him with possession of narcotics, he could be sent to the penitentiary for a term of not less than two years and not more than ten years. The defendant still persisted in his plea of guilty. The trial court then stated "let the record show that the defendant has been advised of the consequences of his plea of guilty not only by his counsel but by this court and, after being so advised he persists in his plea and, therefore, the plea will be accepted."

The defendant argues that after the court imposed the sentence, the accused pleaded for placement in a rehabilitation program rather than to serve the sentence and because counsel for the defendant did not join in the plea, it leaves the record with a doubt whether the accused voluntarily entered his plea of guilty. This conclusion is not substantiated by the record. The record discloses that the attorney for the defendant had negotiated a plea of guilty for the possession of dangerous narcotic drugs; that in a plea of guilty the defendant would be sentenced to the penitentiary for not less than two years nor more than four years; and that the defendant knew this would be the sentence.

It was not until after the defendant, 45 years of age, had entered his plea of guilty and had been sentenced that he stated he was a drug addict and would like to be committed under the Drug Abuse Program. The attorney for the defendant then stated that he had certain discussions with the State and with the court relative to the charge being reduced and a plea of guilty and, therefore, he could not repudiate the negotiated plea and sentence of two to four years in the penitentiary. The record clearly shows that the defendant knew the sentence he would receive prior to his plea of guilty and, therefore, he was in no way prejudiced. (People v. Reed (1971), 3 Ill.App.3d 293, 278 N.E.2d 524; People v. Hartman (1972), 6 Ill.App.3d 543, 285 N.E.2d 600.) Further, even if Rule 402 was not technically complied with, there was "substantial compliance" and the record does not show that the defendant was prejudiced thereby. People v. Trenter (1972), 3 Ill.App.3d 889, 890, 279 N.E.2d 130.

Defendant relies upon People v. Talley (1971), 130 Ill. App.2d 957, 267 N.E.2d 13. The facts in Talley are not analogous

to those in the case at bar. There, after asking the defendant if he understood his right to a jury trial and receiving defendant's negative answer, the trial court made no attempt to explain such right. In the case at bar, defendant was interrogated by his attorney and the court and stated that he understood and knew his rights and the consequences of his plea of guilty, but still persisted in his plea.

There is no reversible error in the record and, therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

BURKE, P.J., and EGAN, J., concur.

55158

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | Appeal from Circuit Court of Cook County. |
| v. | ) | |
| MARVIN R. MATHIS, a/k/a MAURICE R. MATHIS, Defendant-Appellant. | ) | Honorable Saul A. Epton, Presiding. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was indicted on three counts of aggravated battery and one count of attempt murder. He was found guilty of all four counts after a bench trial and sentenced to a term of ten to 20 years on the count charging him with attempt murder.

On appeal the defendant contends that the trial court erred in finding him guilty on all four counts of the indictment because they all arose out of a single transaction and that his sentence is excessive.

The pertinent facts as adduced at trial follow. Robert Gray, a Chicago police officer, testified that at approximately 10:30 P.M. on August 9, 1969, he was acting as a security officer for the Altgeld Gardens Drug Store. He observed the defendant, whom he had known previously, enter the drug store. Officer Gray knew that there was a bond forfeiture and warrant outstanding against the defendant, charging him with aggravated battery against another police officer. Officer Gray identified himself to the defendant, showing his badge and I.D. card. He informed the defendant of the outstanding warrant and told the defendant that he was under arrest. The defendant replied, "Man, I'm not going to jail" and pulled a knife. The defendant stabbed Officer Gray three times. Officer Gray was hospitalized and remained on the critical list for two days. Officer Gray was off work for a period of six months.

Erskine A. Cartwright, the owner of Altgeld Gardens Drug Store, testified that on August 9, 1969, he heard Officer Gray tell the

defendant that he was under arrest. Mr. Cartwright then observed the defendant stab Officer Gray several times. Cartwright struggled with the defendant and was able to get the knife away. The defendant then pulled Officer Gray's gun and Cartwright again struggled with the defendant. Another police officer then entered the store and restrained the defendant.

Maggie Cartwright, the wife of Erskine Cartwright, testified that on August 9, 1969, she was in the back room of her husband's drug store. Officer Gray was brought into the back room, bleeding badly. She transported Gray to Roseland Hospital.

James Thomas, a Chicago police officer, testified that on August 9, 1969, he entered Altgeld Gardens Drug Store and observed Mr. Cartwright attempting to get the defendant off Officer Gray. He restrained the defendant and placed him under arrest.

Marvin Mathis, the defendant, testified that on August 9, 1969, he had just been recently discharged from the Army Hospital. He received a medical discharge from the neuro-psychology ward. On August 9, 1969, he entered the Altgeld Gardens Drug Store to purchase liquor. Officer Gray, whom the defendant had known previously, ran up and grabbed him. The defendant testified that he broke away but was again grabbed by Officer Gray. The defendant then grabbed an object and struck Officer Gray with it. The defendant denied that Gray identified himself or placed him under arrest. He also denied that he carried a knife.

Dorothy Mathis, the defendant's mother, testified that when released by the Army, her son had a nervous condition. His head had been grazed by a bullet while in the Army.

The defendant first argues that the trial court erred in finding him guilty of all four counts of the indictment, since all four charges arose out of a single transaction. We find this

argument without merit. It was proper to try defendant on all four charges. People v. Duszkewycz, 27 Ill. 2d 257, 189 N.E.2d 299. The record clearly shows that although the defendant was found guilty of all four counts of the indictment, he was sentenced only on the count charging him with the greater offense, attempt murder. Since there were no additional sentences on the findings of guilty on the other three counts, defendant was not prejudiced nor were any of his rights violated by the findings. People v. Perry, 47 Ill.2d 402, 266 N.E.2d 330; People v. Chacon, (First Dist. No. 55402); People v. Lilly, ____ Ill. App.3d ____, 291 N.E.2d 207.

The defendant's second argument is that his sentence is excessive and should be reduced. In People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673, the court held that the sentence imposed by the trial court should not be disturbed unless it appears the penalty constitutes a gross departure from the norm for sentence for similar offenses. The facts of the case at bar show that the defendant was confronted by a Chicago police officer who identified himself and informed the defendant that he was placing him under arrest on an outstanding arrest warrant charging aggravated battery. The defendant produced a knife and stabbed the officer three times, causing him to be hospitalized on the critical list. The police officer was forced to remain off duty for six months as a result of his injuries. The sentence imposed in this case is within the statutory limits prescribed for the offense of attempt murder, and a review of the record demonstrates that the trial judge did not impose an excessive sentence.

For the foregoing reasons the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Abstract only.

56387

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT |
| Respondent-Appellee, | ) | OF COOK COUNTY. |
| | ) | |
| v. | ) | |
| | ) | |
| RADOJKO PONJAVICH, | ) | HONORABLE |
| | ) | JAMES J. MEJDA, |
| Petitioner-Appellant. | ) | PRESIDING. |

MR. PRESIDING JUSTICE DRUCKER delivered the opinion of the court:

Radojko Ponjavich (hereinafter petitioner) entered a plea of guilty to an indictment charging him with the offense of murder; he was sentenced to a term of 14 to 17 years. (The record does not disclose whether an appeal was taken from that judgment.)

Petitioner subsequently filed a pro se petition pursuant to the Post Conviction Hearing Act (Ill. Rev. Stat. 1967, ch. 38, par. 122-1 et seq.) alleging that certain of his constitutional rights were violated, to which the State filed a motion to dismiss. After several hearings the trial court sustained the motion and dismissed the petition.

On appeal petitioner contends that the petition was erroneously dismissed because: (1) he did not knowingly and understandingly enter the guilty plea; (2) the guilty plea was taken in violation of the rules set forth in Boykin v. Alabama, 395 U.S. 238; and (3) that his trial counsel was so incompetent as to deprive him of due process of law.

The record reveals that on September 5, 1967, petitioner pleaded guilty to the charge of murdering Branislava Djordjevic on January 23, 1967. Prior to the trial court's acceptance of the plea the following colloquy occurred between the court, petitioner and his privately retained counsel:

> MR. DEVINE (petitioner's counsel): We are ready to dispose of this matter today, your Honor, and would like a conference.

* * *

THE COURT: Motion defendant for a conference will be granted. This matter will be passed for the purpose of the conference.

* * *

MR. DEVINE: May I proceed, your Honor?

THE COURT: Yes.

MR. DEVINE: A plea of not guilty had heretofore been entered in the matter, your Honor, and at this time I would like to withdraw the plea of not guilty and enter a plea of guilty to the indictment.

THE COURT: Mr. Ponjavich, your attorney advised me that you want to change your plea of not guilty to a plea of guilty in this matter, is that correct?

THE DEFENDANT: Yes.

THE COURT: You understand that when you plead guilty you automatically waive your right to a jury trial and there is no jury trial when you plead guilty. Do you so understand?

THE DEFENDANT: Yes.

THE COURT: Before accepting your plea of guilty, it is my duty to advise you, under the law, that on your plea of guilty to this indictment, which charges you with murder, that you may be sent to the penitentiary for a term of years.

It may be any number of years not less than fourteen years nor more than any number of years that this court might see fit to fix. In fact, the court is authorized to impose the death penalty, in a proper case, if there was a showing. Knowing this, do you still persist in your plea of guilty to this indictment?

THE DEFENDANT: Yes.

THE COURT: You know that when you plead guilty you are admitting the charge against you, pursuant to statute?

THE DEFENDANT: Yes.

THE COURT: And, knowing these things, you still wish to plead guilty?

THE DEFENDANT: Yes.

THE COURT: You have discussed this matter with your attorney, have you, and he has explained all these matters to you?

THE DEFENDANT: No.

MR. DEVINE: Well, I explained to you what a plea of guilty is.

THE DEFENDANT: Yes, yes.

MR. DEVINE: I explained to you that no promises are made on your plea of guilty, is that right?

THE DEFENDANT: No.

THE COURT: You understand all these things, do you?

THE DEFENDANT: Yes.

THE COURT: Understanding all these things, do you wish to plead guilty to the charge of murder against you?

THE DEFENDANT: Yes.

The facts of the murder were stipulated to by the petitioner and the State and disclosed that the petitioner shot the deceased, whom he had known for about eight years, after the deceased refused to allow the petitioner access to her apartment. Immediately after the shooting the petitioner surrendered the weapon to police, who had already been summoned prior to the shooting, and admitted to an officer that he had shot the deceased. Further facts admitted into evidence through stipulation were that bullets recovered from the deceased's body were discharged from the weapon surrendered by petitioner to the police, that later at police headquarters petitioner again admitted shooting the deceased, and that petitioner's age at the time of the shooting was 35.

In aggravation and mitigation the petitioner responded in English to questioning by his counsel, that he was born in Yugoslavia; that he came to America in 1959 and took up residence in Chicago that same year; that he was employed as a machine operator at the time of the shooting, working the "four to two" shift; that when he worked nights he would carry a gun for protection; that he had known the deceased since 1959; that he had given her money and bought her a car; that shortly prior to the shooting he found a

hotel receipt in the deceased's purse; that immediately prior to the shooting he had been drinking; and that he did not recall going to the deceased's home on the day of the shooting, nor did he recall shooting her.

The Public Defender represented petitioner at the Post Conviction proceedings which were held before the same judge who accepted the guilty plea. Hearings on the petition and the State's motion to dismiss were commenced on May 18, 1970. Arguments of counsel concerned petitioner's ability to understand the English language and whether in light of the colloquy at the trial, set forth supra, petitioner knowingly and understandingly entered a plea of guilty. The hearing was continued for the purpose of affording petitioner's counsel time to obtain affidavits from petitioner's friends and relatives concerning his ability to understand the English language.

At subsequent hearings it was brought out that petitioner's counsel was unable to contact petitioner's relatives but was informed by two of his acquaintances that petitioner understood the English language to the extent that "he did understand what he was doing" and "he knew what the court was telling him in informing him of his rights." The trial court again reviewed the trial transcript and concluded that petitioner understood the questions propounded to him at the trial and that he was able to converse in the English language.

Opinion

Petitioner first contends that he did not knowingly and understandingly enter his plea of guilty. He stresses the fact that he was of Yugoslavian origin and unfamiliar with the English language and that this unfamiliarity was evidenced by the two negative answers he gave to the court during the admonishment.

No precise formula can be set forth indicating when the trial court should make a further inquiry into the defendant's

ability to understand the admonishment and the consequences of entering a guilty plea. Each case must be viewed in light of its own facts. See People v. Sadeghzaden, 124 Ill. App.2d 375, 260 N.E.2d 447.

In the instant case, in response to questions posed by the court, petitioner unhesitatingly and clearly answered that he understood that by pleading guilty he waived his right to a jury trial, that he was charged with murder and could be sentenced to a minimum of 14 years and could receive the death penalty, that he admitted the charge against him, and that knowing all these things he still wished to plead guilty. The only negative answers given by petitioner were in response to questions concerning the extent to which he had discussed these matters with his attorney. The court thereafter asked him whether he had understood what had been told to him and whether "understanding all these things," he still wished to plead guilty to the charge of murder. Petitioner responded, "Yes." At the hearing in aggravation and mitigation petitioner conversed with his counsel in English.

There is no indication that petitioner did not fully understand what the court was telling him. The fact that petitioner had an alien background does not ipso facto render the court's admonition meaningless, as petitioner would have us conclude. He had lived in the United States for eight years at the time of the guilty plea and, as noted, there was nothing in petitioner's responses from which the court could conclude that he failed to understand the questions posed to him. Counsel for petitioner (at the Post Conviction proceedings) was afforded the opportunity to obtain affidavits supporting petitioner's allegations. Not only was he unable to obtain supporting affidavits but, to the contrary, he informed the court that he had

contacted two of petitioner's friends who told him that petitioner had understood the nature of the proceedings and the consequences of his acts when entering the plea. With the trial record and this further information before it, the court properly concluded that the guilty plea was knowingly and understandingly made. The cases cited by petitioner are factually inapposite. (People v. Gardner, 106 Ill. 76; People v. Washington, 5 Ill.2d 58, 124 N.E.2d 890; People v. Krolage, 224 Ill. 456, 79 N.E.570.)

As to petitioner's second contention that the guilty pleas were accepted in violation of the standards set forth in Boykin v. Alabama, 395 U.S. 238, we note that the instant plea preceded Boykin and that Boykin has only prospective application. People v. Williams, 44 Ill.2d 334, 255 N.E.2d 385. Furthermore, the petitioner did in fact have the benefit of Boykin (which set forth certain requisites in admonishing a defendant prior to accepting a guilty plea) since as noted in People v. Reeves, 50 Ill.2d 28, 276 N.E.2d 318, Illinois has complied with said standards long prior to Boykin.

Petitioner's final contention is that he was represented by incompetent counsel. He alleges that counsel failed to advise him as to the consequences of the guilty plea. We first note the general rule that when one is represented by counsel of his own choosing, the alleged incompetence, to be of constitutional dimension, must be of such a nature as to reduce the proceedings to a farce or a sham. People v. Stanley, 50 Ill.2d 320, 323, 278 N.E.2d 792. From the record in the instant case it appears that petitioner's trial counsel did confer with him as to the guilty plea prior to its entry. The extent and nature of the discussions are not noted. However, we fail to see what counsel could have told petitioner as to the nature and consequences of a guilty plea beyond that which was told to him directly by the

court. Under these circumstances counsel's alleged inactions certainly did not reduce the proceedings to a farce or a sham. The allegation is without merit. The cases cited by petitioner are inapposite. (Gideon v. Wainwright, 372 U.S. 335; Pointer v. Texas, 380 U.S. 400; People v. Berry, 2 Ill. App.3d 760, 277 N.E.2d 328.)

The decision of the circuit court is affirmed.

AFFIRMED.

English and Lorenz, JJ., concur.

Abstract only.

No. 57109

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| PEOPLE OF THE STATE OF ILLINOIS, Respondent, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY |
| vs. | ) | |
| AUBREY STURGIS, Petitioner. | ) | HONORABLE LOUIS B. GARIPPO, PRESIDING. |

PER CURIAM (Fifth Division, First District):

Defendant was indicted for murder and the court appointed counsel to represent him. After conferences with the State's Attorney and his own attorney,and after receiving admonitions from the court, defendant pleaded guilty to the lesser charge of voluntary manslaughter and was sentenced to a term of five to twenty years. He filed a post-conviction petition and an amended supplemental post-conviction petition which, among other things, alleged that his court-appointed attorney promised him he would receive a sentence of five to fifteen years in return for a guilty plea, when in fact he was given the "unexpected" sentence of five to twenty years. After an evidentiary hearing, the court denied the post-conviction relief.

The Public Defender of Cook County was appointed counsel on appeal and has filed in this court a motion for leave to withdraw as appellate counsel, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, alleging that the appeal is wholly without merit and that a prosecution thereof would be frivolous. Defendant was supplied with copies of said motion and brief on November 17, 1972, and was granted leave until January 15, 1973 to file any points he might choose in support of his appeal. Defendant has not responded. The issues presented for our consideration as possible grounds for reversal are whether the trial court sufficiently admonished the defendant as to the significance and consequences of his plea of guilty to the lesser charge of voluntary manslaughter; whether defendant was denied effective assistance of counsel and whether he was denied procedural

due process of law in the post-conviction hearing. The Public Defender concludes these points are without merit. After examining the record we agree.

The record of October 20, 1969, shows that the defendant, represented by court-appointed counsel, understood the consequences of his decision to plead guilty. (People v. Ballheimer (1967), 37 Ill.2d 24, 26-27, 224 N.E.2d 811, 812-813.) The expressions by the trial court in this case were adequate to fully inform the defendant of the consequences of his plea and the possible penalties provided by law.

Incompetency of counsel to constitute a deprivation of constitutional right must be conduct of such a character that it amounts to no defense at all. People v. Ashley (1966), 34 Ill.2d 402, 411, 216 N.E.2d 126, 131, states: "[I]t is well settled that in order to establish incompetency of counsel, actual incompetent representation and substantial prejudice to the defendant as a result thereof must be established." In this case, defendant's counsel successfully negotiated the reduction of a serious charge to a lesser charge and no showing of actual incompetency or prejudice has been shown.

As to defendant's final contention that he was denied due process in the post-conviction hearing itself, it is clear from the report of proceedings that the trial judge considered the evidence and found against the defendant. In People v. Hampton (1972), 7 Ill.App. 3d 1036, 1039, 288 N.E.2d 656, 658, this court said:

> A post-conviction proceeding is civil in nature, and petitioner has the burden of showing that he was denied a substantial constitutional right. People v. Caise, 38 Ill.2d 486, 231 N.E.2d 596.
>
> In the present case, the trial judge held an extensive hearing on the charges alleged in defendant's petition. At the hearing, defendant and a co-defendant testified, as did the Assistant Public Defender. The trial judge stated that his recollection of the case was good, that he had reviewed his notes and the recordsof the case, and that he did not believe defendant's plea had been coerced.

At the time defendant changed his plea from not guilty to guilty, the record indicates that the judge warned him of the nature of his plea and the consequences thereof. Defendant was given ample opportunity to speak to the court, but rather than explaining the alleged coercion, he indicated that his plea was voluntarily given.

It is for the judge who hears the testimony in the post-conviction hearing to determine the credibility of the witnesses, 'and, unless it can be shown such determination is manifestly erroneous, his findings will be upheld.' People v. Rose, 48 Ill.2d 300, 303, 268 N.E.2d 700, 702; People v. Harper, 43 Ill.2d 368, 253 N.E.2d 451.

A review of the record indicates that the trial judge acted properly by holding a hearing on defendant's petition. He made a careful study of the record and the testimony and, based thereon, his determination that there had been no constitutional violation should be upheld.

The motion of the Public Defender to withdraw is allowed and the judgment of the circuit court is affirmed.

Judgment affirmed.

ABSTRACT ONLY

No. 57968

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| Plaintiff-Appellee, | ) | COOK COUNTY |
| | ) | |
| vs. | ) | |
| | ) | |
| HARVEY LEE RUSH, a/k/a/ LARRY HOOD, | ) | HONORABLE |
| | ) | EARL E. STRAYHORN, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (Fifth Division, First District):

Defendant was found guilty after a bench trial of the crime of armed robbery and was sentenced to a term of 2 to 5 years. (Ill. Rev. Stat. 1971, ch. 38, sec. 18-2.) He appeals.

The Public Defender of Cook County was appointed counsel for defendant on appeal and has filed in this court a motion for leave to withdraw as appellate counsel, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, on the grounds that the appeal is wholly without merit and that a prosecution thereof would be frivolous. Defendant was supplied with copies of the motion and brief and permitted a total of nearly ten weeks to February 11, 1973 within which to file any points he desired in support of the appeal. As of February 21, 1973, no reply has been received from the defendant.

The sole issue presented for our consideration as a possible ground for reversal is whether or not the procedure used in the line-up violated due process of law.

Robert Mangum, complaining witness, was robbed of his wallet including several hundred dollars, identification cards and his driver's license on August 10, 1971. He testified that he looked directly at the robber who, after taking the wallet and its contents, struck him with a gun, dazing him and rendering him temporarily unconscious. He reported the incident to the police. A month later on September 10, 1971, he went to the police station and identified defendant in a line-up as the man who had robbed him. He testified

that after he had made the identification a police officer present at the line-up told him that the defendant had been found with his wallet and driver's license. Defendant complained that the line-up identification was suggestive in that complainant was uncertain, that it was only after the police officer's volunteering of the information that defendant had the driver's license that complainant became certain. The police officer's testimony in effect corroborated complainant's. This became a matter of credibility, for determination by the trier of fact. The trial judge resolved this in favor of the State and specifically found the complaining witness' testimony to have been clear and convincing.

The record further reveals that the complaining witness' in-court identification of the defendant as his assailant had a basis independent of the line-up identification, that is, ample time and opportunity to have observed defendant at the time of the robbery itself. Any argument to the contrary, as well as the suggestion that defendant was not represented by counsel at the preindictment line-up, will not support an appeal in this case. (See Kirby v. Illinois (1972), 406 U.S. 682.) This court's further inspection of the record, as required by the Anders decision, discloses no other additional possible ground which would support an appeal in this case.

For these reasons, the motion of the Public Defender of Cook County for leave to withdraw as appellate counsel is allowed and the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

ABSTRACT ONLY

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT |
| vs. | ) | |
| | ) | COOK COUNTY. |
| FRANK THOMAS, Defendant-Appellant. | ) | HON. FRANK R. PETRONE, Presiding. |

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Defendant Frank Thomas was charged with criminal trespass to a vehicle. Ill.Rev.Stat. 1969, ch. 38, par. 21-2. He was found guilty after a bench trial and sentenced to six months in the House of Correction. He appeals.

Defendant makes three contentions: (1) the stipulation entered by the trial court as to the ownership of the car and defendant's lack of authority and consent to enter it was invalid and not binding on defendant; (2) defendant was not proved guilty beyond a reasonable doubt; and (3) the jury waiver entered by the court was not voluntarily, knowingly or understandingly made by defendant.

In view of our conclusion that defendant did not voluntarily, knowingly and understandingly waive a jury trial, it is unnecessary to state the facts in detail. Briefly stated, the record discloses that police officer Mydachek arrested defendant Frank Thomas in an automobile with four other men. The officer testified that defendant was driving the car. Defendant had no driver's license. The vehicle sticker on the car belonged to Mildred Collier. The car belonged to a Mr. Novak. Defendant denied that he was the driver of the car and stated that he didn't know the car was stolen.

At the very outset of the trial defendant demanded a jury trial:

> "Miss Burke (defendant's attorney): Your Honor, this is Mr. Thomas. I conferred with him. He is requesting a jury trial today."

The trial judge denied this request, giving as his reason a stipulation as to ownership and lack of authority:

> "The Court: Stipulation October 16, 1970. Motion for jury trial denied being the rule of court when a stipulation is entered it is the same as a waiver."

And after the court recognized the stipulation:

> "The Court: Plea of not guilty?
> Miss Burke: Plea of not guilty.
> The Court: Do you still demand a jury?
> Miss Burke: Waiver of jury.
> The Court: Plea of not guilty, jury waived."

The inviolate right to trial by jury may be waived only "understandingly" and only "in open court." Ill.Rev.Stat. 1969, ch. 38, par. 103-6. It has been repeatedly held that whether or not the waiver of trial by jury has been "understandingly" made rests on the peculiar facts of each case and cannot be governed by any precise formula. People v. Gay, 4 Ill.App.3d 652, 281 N.E.2d 738.

In People v. Rivera, 34 Ill.2d 575, 216 N.E.2d 786, after the defendant's attorney had said "this will definitely be a jury trial," the trial judge made his displeasure quite obvious and the defense attorney then conferred with his client and a decision was reached to have a bench trial. The Supreme Court, in reversing and remanding for a new trial, after reviewing the facts leading up to the waiver, stated at pages 577-578:

> "In this atmosphere, it can hardly be said that the waiver of a jury trial the defendant 'definitely' wanted was voluntary. Nor does it matter that the defendant was represented by counsel of his own choice for the issue here is not one of incompetency of counsel. We therefore hold that the intemperate remarks of the trial judge resulted in a jury waiver that was not voluntarily made. The defendant is therefore entitled to a new trial."

In the case at bar, defendant's attorney at the very outset stated:

> "Your Honor, this is Mr. Thomas. I conferred with him. He is requesting a jury trial today."

When the judge denied the motion for a jury trial on the erroneous ground that when "a stipulation is entered it is the same as a waiver" and later asked:"Do you still demand a jury?" defendant's counsel's reply: "Waiver of jury" certainly cannot be said to be a voluntary waiver. The court's language "Do you still demand a jury trial" makes the court's displeasure quite evident. (Emphasis added.)

The State relies on People v. Sailor, 43 Ill.2d 256, 253 N.E. 2d 397, in support of its argument that the waiver by defendant's attorney was binding on him. However, where it is obvious that a defendant's waiver was not voluntary, even though made by the attorney, the Sailor case has no application. See People v. Baker, 126 Ill.App.2d 1, 262 N.E.2d 7, and People v. Boyd, 5 Ill.App.3d 980, 284 N.E.2d 699.

The State also argues that the waiver was valid because defendant was continuously represented by counsel for 11 months prior to the trial and this was a sufficient length of time to discuss the question of waiver of a jury trial. The State's argument, however, ignores the fact that at the very outset of the trial, after the claimed 11 months' continuous representation, defendant's counsel requested a jury trial, saying:

> "I conferred with him (defendant). He is requesting a jury trial today."

It was only after the trial court had denied this request on a non-existent rule of law that counsel, without consulting with defendant, submitted to a bench trial. Obviously it would have

been futile to have kept on demanding a jury trial and detrimental to defendant's cause. Defendant is entitled to a new trial.

Since we have reached that conclusion, it is neither necessary nor appropriate to discuss his other contentions. People v. Rivera, 34 Ill.2d 575, 216 N.E.2d 786; People v. Boyd, 5 Ill.App. 3d 980, 284 N.E.2d 699.

The judgment is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

GOLDBERG and EGAN, JJ., concur.

55993

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| THEODORE ZELINKA, HELEN ZELINKA, STEPHEN ZELINKA, WALTER ZELINKA and ESTHER ZELINKA, | ) | |
| Plaintiffs-Appellants, | ) | APPEAL FROM THE CIRCUIT |
| v. | ) | COURT OF COOK COUNTY. |
| CITY OF CHICAGO, a municipal corporation, and JOHN C. MARCIN, City Clerk of the City of Chicago, | ) | HONORABLE HARRY F. COMERFORD, PRESIDING. |
| Defendants-Appellees. | ) | |

MR. JUSTICE McNAMARA delivered the opinion of the court:

This cause of action arose from the results of a local option election held in the 5th Precinct of the 8th Ward in the City of Chicago on November 3, 1970. Pursuant to Section 2 of the Illinois Liquor Control Act, a petition requesting the submission of the ballot proposition to the voters of the precinct had been filed more than 60 days prior to the election in question. Ill.Rev.Stat. 1969, ch.43,par.167. In the election, a majority of voters voted to prohibit the sale of alcoholic liquors in the precinct, and that result was proclaimed by the Canvassing Board. Subsequently, plaintiffs, operators of a tavern in the precinct, filed a suit to contest the validity of the election. In that suit, plaintiffs attacked the validity of the proposition petition. Defendants filed a motion to strike and dismiss the suit; the trial court granted the motion, and the suit was dismissed. We are asked to decide whether plaintiffs, without challenging the proposition petition prior to the referendum election, can contest its validity subsequent to the referendum by filing a suit to contest the election.

Section 4 of the Liquor Control Act sets forth the manner of contesting the validity of the proposition petition, and provides in part as follows:

> Any five legal voters of any political subdivision, district or precinct in which a proposed election is about to be held as provided for in this Act, within any time up to 30 days immediately prior to the date of such proposed election and upon filing a bond for costs, may contest the validity of the petitions for such election by filing a verified petition in the Circuit Court for the county in which the political subdivision, district or precinct is situated, setting forth the grounds for contesting the validity of such petitions. [Emphasis added]

Plaintiffs, however, urge that since the proposition petition is the jurisdictional basis of the election (People ex rel Mayes v. Wanek, 241 Ill. 529, 89 N.E. 708), the right to contest the validity of the election under Section 17 of the Liquor Control Act necessarily carries with it the right to contest the validity of the proposition petition. Section 17, Ill.Rev.Stat. 1969, ch.43,par.182, authorizes any five legal voters of the precinct to contest the validity of such election by filing a verified petition within 10 days after the canvass of the returns of such election.

In a recent decision, Havlik v. Marcin, --Ill.App.2d--, 270 N.E.2d 189, handed down subsequent to judgment in the instant case, this court was faced with the same question, and that holding is dispositive of the issue in the instant case. In Havlik, this court rejected the argument that Section 17 of the Act was applicable under such circumstances and held that the validity of a proposition petition must be determined prior to the holding of the local option referendum election. The court observed that the plain language of Section 4 limits challenge to the validity of the proposition petition to the period more than 30 days immediately prior to the date of the election. The court also noted that the construction urged by plaintiffs, contrary to accepted rules of statutory construction, would strip Section 4 of the Act of all meaning. It therefore concluded that:

> The legislative purpose seems clear and logical to provide for determination of the validity of the proposition petition before the election and not thereafter. This would eliminate possible unfortunate situations in which validity of the petition would be challenged after the trouble and expense of the election. Also, the construction advanced by plaintiffs would permit them to gamble upon the outcome of the election and to challenge the validity of the proposition petition only if the election result was contrary to their own interests or desires. (p.191)

We believe that the reasoning in the Havlik case was logical and sound, and we adhere to the principles enunciated therein. We therefore hold that the trial court acted correctly in dismissing plaintiffs' petition because of their failure to challenge the proposition within 30 days immediately prior to the election.

Plaintiffs, however, argue that Havlik is distinguishable from the case at bar. They maintain that the instant proposition

petition is defective on its face because of its failure to contain the required number of voter's signatures and its lack of verification as to the signators being legal voters in the precinct, and thus subject to attack after the referendum. In our view, however, the nature of the defect allegedly contained in the proposition petition is immaterial. Indeed, the Havlik decision does not mention the nature of the claimed defect in that proposition petition. The crux of that holding, with which we agree, is that if a proposition petition is urged to be defective, it must be contested in accordance with Section 4 of the Act prior to its submission to the voters.

For the reasons stated, the judgment of the circuit court is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.

56026

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| ERIC FORSSEN, Plaintiff-Appellant, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. |
| vs. | ) | |
| DUANE H. RIEKE, Defendant-Appellee. | ) | Hon. Wilbert F. Crowley, Presiding. |

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Eric Forssen (plaintiff) brought an action for personal injuries against Duane H. Rieke (defendant) resulting from a motor vehicle collision. A jury returned a verdict in favor of defendant. Judgment was entered on the verdict. Plaintiff appeals.

Plaintiff urges that the verdict is against the manifest weight of all the credible evidence and contrary to fundamental scientific truth and also that the trial court erred in admitting incompetent evidence. Defendant urges that the evidence does not so overwhelmingly favor plaintiff as to authorize this court to set aside the verdict; and, that the allegedly incompetent evidence was properly received as spontaneous declarations.

On August 23, 1965, at about 7:30 p. m., plaintiff was driving his Rambler automobile in a southeasterly direction on Illinois Highway 14 at or near its intersection with Quentin Road. Route 14 is a four-lane paved highway with two traffic lanes for vehicles moving in each direction. The speed limitation at that point is 55 miles per hour. Plaintiff testified that he was driving at 45 miles per hour in the inner lane.

Plaintiff also testified that there were a few cars proceeding in the opposite direction in the inner westbound lane and that he saw the Chevrolet driven by defendant approaching. Plaintiff further testified that, when defendant's vehicle was about 30 feet away, it suddenly swerved into his lane of traffic without turn signal or other warning. Plaintiff testified that he had no opportunity to swerve or apply his brakes. The impact occurred between the left front of plaintiff's vehicle and the right front of defendant's. Plaintiff further testified that, prior to the collision, he saw no westbound automobile approaching in the outer lane.

A truck driver had been proceeding on Route 14 in the same direction as plaintiff. He testified that plaintiff was about 300 feet ahead and had passed him, driving at a speed of about 45 miles per hour. This witness saw the Chevrolet, driven by defendant, cross in front of plaintiff's car. He also saw a dark colored Mercury automobile slightly ahead of the two vehicles involved in the collision going in the same direction as defendant's car. He did not know the speed of the Mercury automobile but testified that he saw no impact or collision between the Mercury and defendant's Chevrolet. The Mercury did not stop after the collision. This witness also testified that the driver of the Chevrolet seemed to be bleeding and holding his chest when he got out of his car.

A lieutenant in the Police Department of the Cook County Sheriff arrived at the scene shortly after the collision. He identified various photographs which were offered in evidence and testified that they truly and correctly portrayed the condition of the Chevrolet and of the Rambler after the occurrence. He testified that a dent on the front part of the right door of

defendant's Chevrolet appeared to have been caused by an impact. He also testified that the right area of the front bumper of defendant's car appeared to be bowed forward. In his experience, he had noted this to occur upon impact to the bumper.

There were two passengers riding in defendant's car. Both of them were in the front seat with defendant, who was driving. The passenger who was seated in the middle of the front seat testified that defendant slowed his Chevrolet down to make a left turn into a parking lot. The witness noticed a Mercury approaching from the rear and then alongside. He felt that the Mercury "bumped into" the Chevrolet, which was pushed into the oncoming traffic lane. This witness testified that the bump was not violent and that he could not pick an adjective to describe it.

The second passenger in the Chevrolet, seated to the right next to the window, testified that a black Mercury automobile came up very fast from behind. This car crossed in very quickly and caught the right front side of the Chevrolet. The Mercury thus shoved defendant's car over into traffic coming from the opposite direction. He also testified that he did not remember feeling any impact at the door and that the collision with the Mercury was "not a hard one."

The jury also heard testimony by two witnesses employed in gasoline stations at the intersection. The manager of one station testified that he heard, but did not see, a loud collision at the intersection. When he looked up, he saw a black Mercury automobile "sliding" past the eastern driveway of his gasoline station. Over objection by plaintiff, this witness testified that a man from the Chevrolet was screaming that the Mercury automobile which had cut him off should be stopped.

The witness from the other gasoline station testified that he heard a squeal of tires and a loud crash. Over objection by plaintiff, he was permitted to testify that a man from the black Chevrolet jumped out of the window and shouted twice, "Catch that car" and also twice "Get that man." The witness identified the person who made these statements as the defendant. He stated that the Chevrolet was on fire and that defendant apparently "was hysterical." He was inside of his garage when he heard the crash. He heard but one crash and did not see any other automobile except the two which had collided.

Defendant testified that he was driving a black Chevrolet automobile at the time and place in question. Prior to that time his car had no dents in the body. As he approached the parking lot into which he intended to turn, he put on the left turn signal and brought his car to a stop on the highway. He believed that his wheels were straight at that time. A black Mercury approached from behind at a speed of 40-45 miles per hour, came alongside and struck his car, knocking it over into the other lane and causing it to collide with plaintiff's car. The Mercury struck the door, right front fender and bumper of the car. At the time, his car was completely stopped and he testified, "***my foot was on the brake***." Defendant had a clear view of oncoming traffic and he saw the truck approaching from the opposite direction in the outer lane but did not see the Rambler driven by plaintiff.

After all of this testimony had been heard, plaintiff called in rebuttal James Stannard Baker, a traffic engineer and director of Research and Development at the Traffic Institute of Northwestern University. The witness stated his qualifications in connection with the study of traffic and accident problems.

He had never examined the automobiles in question after the collision and he based his testimony on the photographs identified by the lieutenant of Sheriff's police as above described.

Over objection by defendant, this witness expressed the opinion that if an automobile bumper is hit on the left side and forced back, the bumper would pivot so as to cause the right-hand portion thereof to move forward. This in turn would pull the right front fender of the car forward and would open a crack between the fender and the right front door as shown in the photographs.

Thus, the witness expressed the opinion that the damage to the right front of defendant's Chevrolet automobile, as depicted in the photographs, was not a result of direct forcible contact but was the typical result of a left front collision of the automobile from straight ahead. The only contact damage area revealed by the photographs on the right side of defendant's Chevrolet was at one point in the right front door. The witness further testified that, assuming a Chevrolet automobile with three passengers standing on dry pavement with the driver's foot on the brake, the car weighing from 3600 to 4000 pounds; and, further, assuming good tires with normal tread, the force required to move the automobile in any direction with the brakes applied would be three fourths of the weight of the automobile or approximately 3000 pounds. In his opinion, the force required to create the dent in the right-hand door of the Chevrolet would be in the vicinity of 250 pounds or about one tenth of the force required to move the car on the road.

Reversing the stated order, we will first consider the merits of plaintiff's contention with reference to allegedly

incompetent testimony. This contention is directed to testimony by the two gas station men regarding declarations allegedly made by defendant at the time of the occurrence. Plaintiff urges that these declarations were self-serving and hearsay and were therefore incompetent.

The competency of this evidence depends upon the spontaneous declaration or excited utterance exception to the hearsay rule. Perhaps the most cited case upon this proposition is People v. Poland, 22 Ill.2d 175, 174 N.E.2d 804. As appears from that case and from subsequent authorities, (Perkins v. Chicago Transit Authority, 60 Ill.App.2d 431, 437, 208 N.E.2d 867; People v. Freeman, 113 Ill.App.2d 7, 12, 251 N.E.2d 310), a spontaneous declaration of this type must meet three qualifications:

First, the occurrence must be sufficiently startling to produce a spontaneous and unreflecting statement. Undoubtedly in the case at bar the sudden collision and the resulting fire which caused the need for defendant to make an emergency exit through the window are sufficient to meet this test. Defendant's injury and hysteria resulting from the crash are also important factors here. The utterances were made voluntarily and not in response to questions.

Second, there must be an absence of time available to the declarant in which to fabricate. Sitting in an automobile which had caught fire and the need to move with the utmost of haste would seem to bring defendant's statements within this portion of the rule. The questioned statements seem to have been made very shortly after the occurrence. Plaintiff urges a time lapse of one or two minutes. Defendant contends the

lapse was even less and was only as long as it took the two witnesses to run to the scene from their respective gasoline stations.

Third, it is clear that the declaration as made relates to the circumstances of the exciting occurrence, satisfying the third and last requirement.

The fact that defendant did not himself testify in detail regarding these statements does not change the situation with reference to them. People v. Freeman, 113 Ill.App.2d 7, at page 13, 251 N.E.2d 310.

Furthermore, "***in this regard the trial court should be clothed with a reasonable degree of latitude, since the application of the principle depends on the circumstances of the particular case." (Kalschinski v. Illinois Bankers Life Assur. Co., 311 Ill.App. 181, 188, 35 N.E.2d 705.) We cannot say that the trial court acted unreasonably in admitting this testimony. On the contrary, we find that the trial court acted properly in overruling objections made by plaintiff and in permitting the testimony regarding these spontaneous declarations by defendant.

We turn next to consideration of the first point made by plaintiff concerning the weight of the evidence. Counsel for plaintiff argue ably and tenaciously that a reading of all of the evidence demonstrates that the verdict of the jury is against the manifest weight of the credible evidence and is contrary to "fundamental scientific truth" so that the trial court erred in denying plaintiff's post-trial motion for a new trial. We have carefully read and analyzed all of the testimony and we cannot agree. In addition, we have examined the many authorities cited by plaintiff. In Burns v. Stouffer, 344 Ill.App. 105, 100 N.E.2d 507, the court pointed out that the record presented

a complete conflict in the evidence rather than a case in which the jury rejected uncontradicted testimony so that the verdict could not be deemed manifestly against the weight of the evidence. In Zollman v. Symington Wayne Corp., 438 F.2d 28 (7th cir. 1971), a verdict for plaintiff which was contrary to verified and uncontradicted tests and experiments which completely negated plaintiff's theory of liability was set aside. We find nothing in these or any of the many remaining cited cases which would require us to apply to this record any principle other than the usual determination of whether the verdict of the jury is contrary to the manifest weight of the evidence.

When all of the many extensive arguments made by both sides are stripped away from the evidence, the analysis must result that the record presents a situation in which three eyewitnesses aver that the automobile in which they were riding was struck by another car and driven forward. Plaintiff denies that he saw the Mercury automobile which allegedly did this. This denial is corroborated by the evidence of the truck driver whose vehicle was behind that of plaintiff. On the other hand, there is other credible evidence that there was a Mercury automobile proceeding in the same direction as defendant's car. There is also evidence that defendant shouted spontaneously for the Mercury automobile to be stopped. Against this, there is the opinion of a person, undoubtedly qualified in his field, who did not examine the automobiles after the impact, but who theorized from examination of photographs that the damage to the right front portion of the bumper of defendant's automobile was caused by the impact at the front of the left-hand portion thereof, and that the damage to the right-hand door of defendant's

car resulted from impact which was not of sufficient strength to move the car. The first of these conclusions is supported by the opinion of the lieutenant of police. The latter is contradicted by several eyewitnesses.

Under all of the facts and details presented by the evidence in the case at bar, we cannot find that the testimony of the expert was an irrefutable and "fundamental scientific truth" as plaintiff contends. On the contrary it was simply his own opinion which was contradicted by other credible elements of proof submitted by eyewitnesses. In this situation, the jury was not required to accept the opinion evidence of the expert. Merchants Nat. Bk. v. E. J. & E. Ry. Co., 49 Ill.2d 118, 122, 273 N.E.2d 809, affirming 121 Ill.App.2d 445, 462, 257 N.E.2d 216; Lombard Park Dist. v. Chicago Title & Trust Co., 105 Ill. App.2d 371, 375, 245 N.E.2d 298 involving opinion testimony of experts in a zoning case; Jones v. Jones, 406 Ill. 448, 451, 94 N.E.2d 314 involving the opinion testimony of a handwriting expert.

In our opinion, this record presents conflicts in evidence and questions of credibility which it was the duty of the jury to determine. The trial court who saw and heard all of the witnesses approved the verdict and denied plaintiff's motion for a new trial. In a situation of this type, the trial court determined whether the verdict was against the weight or preponderance of the evidence. This court, reviewing the entire record after motion for a new trial has been denied, may reverse only when the verdict is contrary to the manifest weight of the evidence; Heuer v. Goldberg, 106 Ill.App.2d 55, 61, 245 N.E.2d 497; or, stated otherwise, only when "the opposite conclusion is clearly evident." (Reed v. Knol, 7 Ill.App.3d 163, 166, 287 N.E.2d 238.) Few legal principles have been reiterated more often than

the rule that where the evidence is conflicting, the resolution of the issue rests with the jury and the reviewing court may not substitute its own judgment for the verdict. We cannot disregard this rule simply because the opinion evidence of the expert purports to rest upon a scientific basis. We are not at liberty to substitute the arguments of plaintiff's counsel or our own ideas for the verdict of the jury.

Judgment affirmed.

BURKE, P.J., and EGAN, J., concur.

No. 55401

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| Plaintiff-Appellee, | ) | COOK COUNTY. |
| | ) | |
| vs. | ) | |
| | ) | |
| JOHN VALENTINE, | ) | HONORABLE |
| | ) | PHILIP ROMITI, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (First District, Third Division):

The defendant, John Valentine, was indicted for the offense of robbery and aggravated battery on Herman Jackson. He was also indicted for the offense of robbery and aggravated battery on Arthur Finch in violation of Sections 18-1 and 12-4 of the Criminal Code. (Ill.Rev.Stat. 1969, ch.38, par.18-1, par.12-4.) Valentine was found guilty, after a bench trial, and sentenced to terms of not less than two years nor more than six years in the Illinois State Penitentiary on each of the charges. The judgment also provided that the sentences were to run concurrently.

The sole issue on appeal is whether it was legal for the trial court to impose concurrent sentences for the robberies and aggravated batteries on Jackson and Finch.

Herman Jackson and Arthur Finch were waiting for an "L" at Van Buren and Canal when they met the defendant, John Valentine, whom Finch had previously known. The three went to Valentine's apartment. After about one-half hour, Valentine asked Jackson if he would like to shoot some dice, and Jackson told him that he did not gamble and besides Jackson was ready to leave because he had to take some packages home. As Jackson reached over to pick up the packages, Valentine hit him in the eye. Finch asked Valentine why he hit Jackson, and Valentine turned around and hit Finch.

Valentine ripped Jackson's pocket and took about $7 and then threw Jackson out of the apartment and down the steps. Valentine kicked Finch in the face and hit him in his left eye

with his fist. Valentine then reached in Finch's pocket and took the $120 he had there and then threw Finch outside the apartment.

Defendant does not argue on appeal that the evidence adduced at trial was not sufficient to sustain the convictions. Rather, he argues that it was error for the trial court to impose sentences on the aggravated battery charges because the beatings of Jackson and Finch were merely preludes to the robberies and were all of a single transaction. Ill.Rev.Stat. 1971, ch.38, par.1-7(m).

Defendant contends that the sentences for the lesser crime of aggravated battery merged with the sentences for robbery and, therefore, the sentences for the lesser crime should be reversed. Although two separate and distinct felonies cannot be merged (People v. Hill (1931), 345 Ill. 103, 177 N.E. 723), the sentence for the lesser felony may, under proper circumstances, be vacated.

The sentence for robbery is imprisonment in the penitentiary from one to 20 years (Ill.Rev.Stat. 1971, ch.38, par. 18-1(b)), while the aggravated battery is one year in an institution other than the penitentiary or from one to five years in the penitentiary. Ill.Rev.Stat. 1971, ch.38, par.12-4(b)(9).

The law is clear that a defendant cannot be sentenced for two offenses if each offense arises from the same act.(People v. Stewart (1970), 45 Ill.2d 310, 259 N.E.2d 24; People v. Barnett (1972), 7 Ill.App.3d 185, 287 N.E.2d 247.) However, if the facts of the case demonstrate that separate and distinct conduct resulted in the commission of more than one offense, concurrent sentences are proper. People v. Baker (1969), 114 Ill.App.2d 450, 252 N.E.2d 693.

In People v. Miller (1971), 2 Ill.App.3d 206, 276 N.E. 2d 395, this court was faced with a case similar to the case at bar. There a defendant was found guilty and sentenced for both armed robbery and aggravated battery. The facts of the case demonstrated that the use of force was that used to effectuate

the armed robbery and not for a separate motive. This court reversed the aggravated battery conviction holding that, since the act constituting aggravated battery was not "independently motivated" from the offense of armed robbery, the imposition of two separate sentences was improper.

In the case of People v. Johnson (1972), 6 Ill.App.3d 233, 285 N.E.2d 611, this court held that the acts of attempted theft and battery arose from the same conduct; and, therefore, the concurrent sentences were invalidly imposed, because the defendant was convicted of two offenses which arose from the same act or transaction.

From the foregoing it is apparent that the offenses in the instant case arose from the same conduct. There is nothing in the record that suggests that the conduct which constituted the aggravated batteries on Jackson and Finch were independently motivated or otherwise separable from the conduct which constituted the robberies of Jackson and Finch. The motivation for the conduct obviously was the robberies and the aggravated batteries were merely part of the course of conduct which was directed to the accomplishment of the robberies.

Where the defendant is convicted of multiple offenses which arose from a single act, the court must vacate the sentence of aggravated battery, which is the less serious offense.

Accordingly, that part of the judgment of the trial court sentencing the defendant, John Valentine, to the Illinois State Penitentiary for a term of years not less than two years nor more than six years for the crime of robbery of Herman Jackson and further sentencing the defendant to the Illinois State Penitentiary for a term of years not less than two years nor more than six years for the crime of robbery of Arthur Finch, said sentences to run concurrently to each other, is affirmed; and that part of the judgment sentencing the defendant to the Illinois State Penitentiary for the aggravated batteries on

Herman Jackson and Arthur Finch are vacated.

Judgment affirmed in part;
judgment vacated in part.

Per curiam.

57292

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| MILTON ZALE, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| vs. | ) | COOK COUNTY |
| | ) | |
| THOMAS HESS, | ) | HON. THOMAS CASEY, |
| Defendant-Appellee, | ) | JUDGE PRESIDING. |
| | ) | |

MR. PRESIDING JUSTICE BURMAN delivered the opinion of the court.

The appellant in this case has complied with all statutory requirements and rules of this court by filing the record and his brief. No appearance or brief has been filed in this court by defendant-appellee.

Plaintiff filed a suit seeking a judgment in the amount of One Thousand Four Hundred Seventeen and 50/100 Dollars ($1,417.50) and for One Hundred Fifty-two and 50/100 Dollars ($152.50) attorney's fees or a total of One Thousand Five Hundred Seventy Dollars ($1,570.00) for alleged non-payment of rent. After judgment by confession was entered a post-trial hearing was conducted and the judgment was reduced to Eight Hundred Fifty-three and 10/100 Dollars ($853.10).

Plaintiff contends that the trial court erred in allowing parol evidence to modify a written lease and in entering judgment for only one-half of the six months rental.

Where plaintiff has fully perfected his appeal and appellee has filed no brief or argument to sustain the judgment it may be reversed without a consideration of the cause on its merits. See Kirby v. Kolbosh, 2 Ill.App.3rd 46; Ogradney v. Daley, 60 Ill.App.2d 82.

In view of the foregoing the cause is reversed and remanded with directions to enter judgment in accordance with the allegations in the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

ADESKO AND DIERINGER, JJ.,

CONCUR.

(Abstract only)

56735

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| OCIE WILSON, | ) | |
| | ) | |
| Petitioner-Appellant, | ) | |
| | ) | Appeal from the Circuit |
| | ) | |
| v. | ) | Court of Cook County. |
| | ) | |
| | ) | |
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | Jacques F. Heilingoetter, J. |
| Respondent-Appellee. | ) | |

PER CURIAM:

Ocie Wilson filed a post-conviction petition in accordance with the provisions of Article 122 of the Criminal Code (Ill.Rev. Stat., 1967, ch. 38, para. 122-1), asking the trial court to vacate the judgments entered on the jury findings of guilty of unlawful possession of a narcotic drug and the unlawful sale of heroin. Wilson was sentenced to twenty to forty years in the penitentiary for the unlawful sale of heroin and five to ten years on the charge of unlawful possession of a narcotic drug; said sentences to run concurrently. Wilson's co-defendant, James Burks, was found guilty of the unlawful sale of heroin and was sentenced to twenty to forty years in the penitentiary. Burks and Wilson appealed to the Illinois Supreme Court where the judgment of the trial court was affirmed as to Wilson and reversed as to Burks. People v. Wilson (1970), 45 Ill.2d 581, 262 N.E.2d 441. The State's Attorney filed an oral motion to dismiss the post-conviction petition, which was sustained without an evidentiary hearing and the petitioner appeals.

The Public Defender was appointed to represent the petitioner on this appeal and has filed a motion to withdraw under Anders v. California (1967), 386 U.S. 738, 18 L.ed.2d 493, 87 S.Ct. 1396, supported by a brief, on the ground that the appeal is without merit. A copy of the motion and brief of the Public Defender was mailed to the petitioner, who was afforded time within which to file any points he desired in support of the appeal. The petitioner has not responded.

In his post-conviction petition, Wilson contended that the judgment of the trial court should be reversed because the trial court erred in accepting the unsupported opinion of the arresting officers that their paid informer was reliable; that the arrest was illegal because the alleged sale to the police informer took place out of the view of the arresting police officers; that the reliability of the addict-informer, whose testimony resulted in Wilson's conviction, is untrustworthy; and that he was not proven guilty beyond a reasonable doubt.

On direct appeal the Illinois Supreme Court held that the evidence was sufficient to establish the reliability of the informer and for the jury to determine that Wilson was guilty beyond a reasonable doubt. People v. Wilson (1970), 45 Ill.2d 581, 586-587, 262 N.E.2d 441.

The judgment of the Illinois Supreme Court in the direct appeal is res judicata as to all issues actually raised and those

that could have been raised, but were not, are deemed waived. People v. French (1970), 46 Ill.2d 104, 107, 262 N.E.2d 901; People v. Beckham (1970), 46 Ill.2d 569, 264 N.E.2d 149; People v. Johnson (1971), 47 Ill.2d 568, 268 N.E.2d 1; People v. Jones (1972), 5 Ill.App.3d 951, 284 N.E.2d 418.

Our review of the transcript taken at the post-conviction hearing reveals that the petitioner's appointed counsel fulfilled all requirements of the case of People v. Slaughter (1968), 39 Ill.2d 278, 235 N.E.2d 566, and we are unable to find any violation of petitioner's constitutional rights.

In view of the foregoing, we conclude that an appeal in this case would be without merit and could not be successful. The motion of the Public Defender of Cook County is accordingly allowed and the judgment is affirmed.

Motion allowed;
judgment affirmed.

10 I.A 3771

No. 57285

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| Plaintiff-Appellee, | ) | COOK COUNTY. |
| | ) | |
| vs. | ) | |
| | ) | |
| WALTER SHACKLEFORD, | ) | HONORABLE |
| | ) | LAWRENCE I. GENESIN, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (First District, Third Division):

Defendant, Walter Shackleford, was found guilty after a bench trial of the offense of unlawful use of weapons, in violation of Section 24-1 of the Criminal Code and was sentenced to a term of six months in the House of Correction. (Ill.Rev.Stat. 1971, ch.38, par.24-1.) On this appeal his sole contention is that the trial court was in error in denying his motion to suppress evidence which was renewed at trial after it had been denied by another judge after a preliminary hearing.

This court has recently decided this identical question in the case of People v. Holland (No. 55788 Ill.App.Ct., 1972). There it held that under circumstances identical to those here, the trial judge properly refused to consider the defendant's motion to suppress based upon the authority of People v. Taylor, 50 Ill.2d 136, 277 N.E.2d 878. The Holland case is controlling, and the judgment is therefore affirmed.

Judgment affirmed.

55289

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|---|---|---|
| WILTON HOUSE, INC., a corporation, Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. |
| vs. | ) | |
| CITY OF CHICAGO, a municipal corporation, et al., Defendants-Appellants. | ) | HONORABLE EDWARD F. HEALY, PRESIDING. |

MR. JUSTICE ENGLISH delivered the opinion of the court:

Plaintiff's complaint as amended consists of Count I in declaratory judgment and Count II under the Administrative Review Act in regard to the issuance of a license to operate a Sheltered Care Home. Defendants filed a motion to strike and dismiss Count I and an answer to Count II.

After an evidentiary hearing with respect to Count II only, the circuit court entered a judgment granting the prayer of plaintiff's complaint under that count, from which order defendants have sought to appeal. However, since no hearing has been held or final order entered with respect to Count I, the case is still pending, and we have no jurisdiction to proceed with this appeal for lack of an appealable order. See Rubinson v. Pancoe, 54 Ill.App.2d 224, 203 N.E.2d 767; Cook County v. Hoytt, 41 Ill.App.2d 122, 190 N.E.2d 150; and Wright v. Massey-Harris, Inc., 60 Ill.App.2d 137, 208 N.E.2d 340. Also see Supreme Court Rule 304, effective as amended Jan. 1, 1970, Ill. Rev.Stat. 1971, ch. 110A, par. 304, supplanting Ill.Rev.Stat. 1965, ch. 110, par. 50(2).

If an appealable order were to be entered in this case by the circuit court, and the same subject matter were again to be presented to this court, the abstracts and briefs now on file could be refiled in the new appeal without reprint.

This appeal is dismissed.

APPEAL DISMISSED.

DRUCKER, P.J., and LORENZ, J., concur.

(Publish abstract only.)

56332

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| Plaintiff-Appellee, | ) | COOK COUNTY. |
| | ) | |
| v. | ) | |
| | ) | |
| ALLEN JOHNSON, | ) | HONORABLE |
| | ) | ALPHONSE F. WELLS, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

The defendant, Allen Johnson, was indicted for the offense of involuntary manslaughter in violation of Section 9-3(a) of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 9-3(a)) and of the offense of speeding in violation of Section 49(a)(2) of the Motor Vehicle Act (Ill. Rev. Stat. 1969, ch. 95-1/2, par. 146(a)(2)). After a bench trial defendant was found not guilty of the offense of speeding but was found guilty of reckless homicide and sentenced to a term of not more than one year nor more than three years.

In his appeal he raises the following issues: (1) whether Count I of the indictment was sufficiently clear to state the offense of involuntary manslaughter; (2) whether the trial court could properly find the defendant guilty of reckless homicide; and (3) whether the defendant was proven guilty beyond a reasonable doubt.

In view of the position we take on point (3), it will be unnecessary to address the other issues raised on appeal. The evidence elicited at trial follows.

James McInerney, a driver for the Commonwealth Edison Company, testified that on June 1, 1970, he was driving a truck on Dante Avenue going southwest when he stopped at the intersection of Dante and South Chicago Avenue for a red traffic light. Walter Kusiolek, also an employee of Commonwealth Edison Company, was riding in the seat beside him.

After the traffic light turned green, McInerney proceeded

into the intersection at approximately five miles an hour to make a southeast (left) turn onto South Chicago Avenue. Prior to entering the intersection he saw other vehicles stop for the red light on South Chicago Avenue. He testified that he could not remember anything from the time he entered the intersection until he woke up in the hospital the following evening. McInerney and Kusiolek were thrown out of the truck. Kusiolek died from his injuries on June 2, 1970. On cross-examination it was brought out that at the coroner's hearing and before the Grand Jury, McInerney testified that he never stopped for a red light at Dante and South Chicago, i.e., the light on Dante was always green and he proceeded through the intersection until the moment of impact.

Officer Albert Busin of the Chicago Police Department testified that he had occasion on June 1, 1970, to investigate a fatal accident involving Walter Kusiolek. He arrived at the intersection of Dante and South Chicago Avenue at approximately 2:20 P.M. and found that there had been a traffic accident involving a Commonwealth Edison truck and a black Cadillac owned by the defendant. Busin prepared a sketch of the positions of the vehicles and based upon this sketch and his observations and measurements taken at the scene, he testified that he found the Commonwealth Edison truck on the east side of South Chicago Avenue on the wrong side of the street, facing southeast. The defendant's car was at the southwest side of South Chicago Avenue, halfway on the curb and halfway on the street. He determined that the accident occurred in the middle of the intersection because of the dirt from underneath the two automobiles and pieces of chrome and other automobile parts at that location. Busin paced off the distance and determined that the black Cadillac had travelled approximately 100 to 105 feet after the accident, and the truck

had travelled approximately 50 to 60 feet from the point of impact.

Busin further testified that the Cadillac's left front grille and left fender were damaged, while the truck was damaged on the right front fender and the right rear fender. Busin testified that at the time of impact, the defendant's car was travelling southeast on South Chicago Avenue and the truck was on Dante going southwest and trying to go southeast on South Chicago Avenue after making a left hand turn. On the day of the accident it had been drizzling all day and the streets were wet. Busin did not find any skid marks on the street from either one of the vehicles. He had a conversation with the defendant at the scene of the accident. The defendant said that the truck had gone through the red light and struck him.

William Decker, an engineer from the Commonwealth Edison Company, testified that on June 1, 1970, at approximately 10:00 A.M., he was a passenger in a car driven by Robert Roethel. They were on their way to visit a company installation in the 6100 block of Prairie Avenue. After exiting from the Dan Ryan Expressway, they stopped for a traffic signal at 63rd Street and Yale Avenue. They were struck from behind by a Cadillac automobile. The driver was the defendant. A police vehicle came up the ramp from the Dan Ryan and Decker flagged the squad car over to make a report. The police officer asked Johnson what happened and Johnson said he had attempted to stop but his brakes weren't working as good as they should have been, and that he was on his way to get them repaired.

It was stipulated that Dr. George Goldenberg, if called to testify, would testify that Walter Kusiolek died on June 2, 1970, as a result of injuries in the accident which took place on June 1, 1970, although the doctor had no independent knowledge as

to how the injuries occurred. No evidence was offered by the defendant.

The defendant was found not guilty of the offense of speeding.

Opinion

A person who kills an individual without lawful justification commits involuntary manslaughter if the acts which cause the death are such as are likely to cause death or bodily harm and are performed recklessly. Ill. Rev. Stat. 1969, ch. 38, par. 9-3(a). A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that his acts may cause death or great bodily injury and such disregard constitutes a gross deviation on the standard of care which a reasonable person would exercise in the same situation. Ill. Rev. Stat. 1969, ch. 38, par. 4-6.

Before a finding of guilty of reckless homicide can be sustained, the proof must disclose that the defendant's conduct in driving his automobile was such as to prove beyond a reasonable doubt that he was guilty of willful and wanton negligence. People v. Burgard, 377 Ill. 322, 36 N.E.2d 558. Driving through a red light does not, of itself, establish that a motorist was acting recklessly (People v. Mowen, 109 Ill. App.2d 62, 248 N.E.2d 685), nor does operating a motor vehicle over the speed limit evidence a reckless conduct. People v. Potter, 5 Ill.2d 365, 125 N.E.2d 510. Each case must be considered on its own facts. People v. Rowe (First District No. 56384, December 20, 1972).

In the case at bar the evidence does not disclose that the defendant was speeding or that he was driving his automobile in a reckless and wanton manner. The testimony of McInerney that he stopped for a red light at Dante Street and waited until the light turned green before entering the intersection of Dante Street and South Chicago Avenue, to make a left turn into the intersection,

does not prove beyond a reasonable doubt that the defendant was speeding or that he went through a red light. This is especially true in view of the fact that the trial court found the defendant not guilty of the offense of speeding, and that the defendant told the police officer that the truck had gone through the red light and struck the defendant. Moreover, McInerney's testimony at trial was impeached by his prior inconsistent statements before the Coroner's Jury and Grand Jury, casting a further cloud as to what actually occurred at the intersection. Nor does the fact that the defendant had an accident on the morning of June 1, 1970, at which time he stated that his brakes weren't working as well as they should have been, prove that his brakes were defective at the time of the accident at Dante and South Chicago Avenue in the afternoon of the same day or that insufficient braking power was a factor.

Where the acts or circumstances can be attributable to either an innocent or a criminal cause, the innocent hypothesis should be adopted. People v. Potter, 5 Ill.2d 365, 125 N.E.2d 510; People v. Altiere, 11 Ill. App.2d 489, 138 N.E.2d 61. In the case at bar the acts of the defendant and the circumstances surrounding the fatal accident are not attributable to criminal negligence and, therefore, the judgment finding the defendant guilty of reckless homicide is erroneous and should be reversed. The cases cited by the State are factually inapposite.

The judgment is reversed.

REVERSED.

Abstract only.

56476

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|---|---|---|
| WICK BUILDING SYSTEM INC., BUDGER HOMES DIVISION, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. |
| Plaintiff-Appellee, | ) | |
| vs. | ) | |
| EPHRAIM DOHNER, et al., | ) | HONORABLE EDWARD F. HEALY, PRESIDING. |
| Defendants-Appellants. | ) | |

MR. JUSTICE ENGLISH delivered the opinion of the court:

Plaintiff filed a two-count amended complaint seeking in Count I confirmation of a foreign judgment, and in Count II an original malice judgment apparently on the same or a similar claim. Defendants filed an answer to Count I and a motion to strike and dismiss Count II. Defendants also filed a counterclaim to which plaintiff filed a "reply."

After a hearing, the circuit court entered a judgment on July 16, 1971, granting the prayer of Count I of the amended complaint, and specifically continuing to a later date a hearing on defendants' motion with respect to Count II. No hearing was conducted nor order entered on defendants' counterclaim. Defendants filed a motion to vacate and for a rehearing or new trial which was denied on August 13, 1971. Defendants seek to appeal from both orders.

Since Count II of plaintiff's amended complaint and defendants' counterclaim both remain undisposed of, neither of the orders covered by this appeal is appealable. See Rubinson v. Pancoe, 54 Ill.App.2d 224, 203 N.E.2d 767; Cook County v. Hoytt, 41 Ill.App.2d 122, 190 N.E.2d 150; and Wright v. Massey-Harris, Inc., 60 Ill.App.2d 137, 208 N.E.2d 340. Also see Supreme Court Rule 304, effective as amended Jan. 1, 1970, Ill.Rev.Stat. 1971, ch. 110A, par. 304, supplanting Ill.Rev.Stat. 1965, ch. 110, par. 50(2).

If an appealable order or orders were to be entered in this case by the circuit court, and the same subject matter were again to be presented to this court, the abstracts and briefs now on file could be refiled in the new appeal without reprint.

This appeal is dismissed.

APPEAL DISMISSED.

DRUCKER, P.J., and LORENZ, J., concur.

(Publish abstract only.)

57105

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|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE CIRCUIT |
| Plaintiff-Appellee, | ) | |
| | ) | COURT OF COOK COUNTY. |
| v. | ) | |
| | ) | Hon. Arthur L. Dunne, |
| HERMAN LOUIS COCHRAN, | ) | Presiding. |
| | ) | |
| Defendant-Appellant. | ) | |

PER CURIAM:

Herman Louis Cochran, hereafter called defendant, was indicted on charges of aggravated battery and attempt rape in violation of sections 8-4 and 12-4 of the Criminal Code. Ill. Rev.Stat. 1971, ch.38,pars.8-4, 12-4. He was found guilty of both charges after a bench trial and was sentenced to a term of four to twelve years in the Illinois State Penitentiary. The defendant, on appeal, argues only that his conviction and sentence for aggravated battery are erroneous.

The defendant does not challenge the sufficiency of the evidence to support either conviction and a detailed review of the facts is not necessary for our determination of this cause. Briefly summarized, the evidence adduced at trial demonstrated that on September 12, 1970, at approximately 5:00 A.M., the defendant accosted the prosecutrix as she was walking down the street. The defendant grabbed her from behind and threatened her with a knife. She was pulled into an alley where the defendant beat her and attempted to rape her. Police officers arrived at the scene and observed the defendant coming out of the alley with his penis hanging out and blood on his trousers. The defendant was placed under arrest.

The defendant argues that his conviction and sentence for aggravated battery are erroneous, based upon two points. First, he argues that the report of proceedings demonstrates that the trial judge imposed but one sentence while the common law record shows that separate sentences were imposed on each charge to run concurrently. Secondly, the defendant argues that since both crimes arose out of the same occurrence, only one sentence may properly be imposed.

The sentence imposed for aggravated battery is defective in two aspects. First, the maximum statutory sentence for aggravated battery is ten years. Ill.Rev.Stat. 1971, ch.38, par.12-4. The defendant's sentence of four to twelve years for aggravated battery is therefore clearly improper. People v. Smith, --Ill.App.3d--, 290 N.E.2d 261 (No. 55804, supplemental opinion filed November 22, 1972). Secondly, only one sentence may be imposed when different offenses arise out of the same occurrence. People v. Randolph, 4 Ill.App.3d 277, 280 N.E.2d 774. In the case at bar, there is no evidence in the record which would demonstrate that the conduct which constituted the offense of aggravated battery was separate from the conduct which constituted the offense of attempt rape.

The judgment and conviction of the sentence for attempt rape are affirmed. The judgment for aggravated battery is vacated.

Affirmed in part;
modified in part.

PER CURIAM

56729

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal from the Circuit |
| | ) | |
| v. | ) | Court of Cook County. |
| | ) | |
| | ) | |
| EDDIE SMITH, | ) | |
| | ) | Richard J. Fitzgerald, J. |
| Defendant-Appellant. | ) | |

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

In December 1969 the defendant Eddie Smith pleaded guilty to the offense of indecent liberties with a child and was placed on probation for three years. One of the conditions of probation was that he was not to violate any criminal law of Illinois. In September 1970 he was convicted on the charge of unlawful use of a weapon and for the offense of having no firearm identification card issued by the State. He was sentenced to one year in the Cook County jail.

A rule to show cause was subsequently issued and a hearing was held on the revocation of his probation. At the hearing it was stipulated that he had been found guilty of the weapon and firearm charges as alleged in the rule to show cause. His probation was revoked and he was sentenced to the penitentiary on the indecent liberties conviction for a term of two to five years.

The public defender was appointed to represent Smith on appeal and he has moved to withdraw as appellate counsel. A

brief (pursuant to Anders v. California, 386 U.S.738) supports his motion and sets forth the contentions which, in his opinion, might be raised. He concludes that the appeal is without merit and could not be successful.

A copy of the motion and the brief were mailed to the defendant. He was advised that he had two months to file whatever additional points he might wish in support of his appeal. More than this time has elapsed and he has not responded.

The public defender's brief raised one point relating to the quality of the evidence presented and one relating to procedural due process at the revocation hearing. In resolving the first of these points against the defendant, the public defender reasons correctly that where there is a stipulation concerning, or proof of, a prior conviction which establishes the violation of a condition of probation, the prosecution is relieved from proving the violation by a factual preponderance of the evidence. In People v. Riso (1970), 129 Ill.App.2d 356, 264 N.E.2d 236, this court stated:

> "Receiving stolen property is a State as well as federal offense. Ill.Rev.Stat., 1965, ch. 38, para. 16-1(d). Riso's violation of the conditions of his probation had been established in a court of record. There was no need for the State court to go behind the record and review the federal conviction (Cf. People v. Freeman, 49 Ill.App.2d 464, 200 N.E.2d 146 (1964)) and there was no need to hear testimony to see if the evidence preponderated against an accused who had been found guilty beyond all reasonable doubt."

See also People v. Tempel (1971), 131 Ill.App.2d 955, 268 N.E.2d 875.

The second point pertains to the denial of the defendant's request that he be allowed to make a motion to suppress evidence of the weapons which he was alleged to have possessed and which led to his prior conviction. Appellate counsel reasons, again correctly, that there was no denial of due process because the motion was inappropriate to a revocation hearing and ruling of the court on this motion as well as on other matters was substantially in accord with accepted and well-recognized procedural requirements.

The brief concludes that, in view of the evidence of the violation of probation, the trial court adhered to the applicable statutes and case law and did not abuse its discretion in revoking probation and sentencing the defendant.

There is, however, a third point which merits consideration. The defendant's conviction on the firearms registration and weapon charges upon which the revocation was based, was reversed without remandment by this court. Our opinion in People v. Crowder, Smith, et al. (1972), 4 Ill.App.3d 1079, 283 N.E.2d 342, held that the evidence did not prove that weapons, which were recovered from the floor and under the seats of an automobile in which Smith was riding with four other men, were known to Smith or in his possession. The question naturally arises whether the reversal raises a substantial issue as to the validity of the probation revocation. This is

especially so since the evidence presented to the court pertaining to Smith's guilt, apart from the stipulation that he had been found guilty, was of questionable probative value in establishing — even by a preponderance of the evidence — his commission of the crimes.

The public defender's motion to withdraw will be denied so that the question we have propounded can be researched and adequately briefed.

Motion to withdraw denied.

Motion denied.

McNamara and McGloon, JJ., concur.

No. 57361

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| Plaintiff-Appellee, | ) | COOK COUNTY. |
| | ) | |
| vs. | ) | |
| | ) | |
| GREGORY TAYLOR (Impleaded), | ) | HONORABLE |
| | ) | LOUIS B. GARIPPO, |
| Defendant-Appellant. | ) | PRESIDING. |

MR. JUSTICE McGLOON delivered the opinion of the court:

Defendant, Gregory Taylor, and Clyde Gunn were indicted together for armed robbery. Taylor was tried separately and found guilty as charged by a jury in the circuit court of Cook County. He was sentenced to the penitentiary for a term of not less than 10 nor more than 20 years.

On appeal defendant raises two issues. First, he contends that the trial court erred in refusing to suppress in-court identifications and testimony of pre-indictment identifications. Specifically he objects to the court's allowance of testimony at trial of an extra-judicial pre-indictment identification by certain prosecution witnesses. Second, he contends that he was denied due process of law because the pretrial identification procedures followed by the police were grossly suggestive and conducive to mistaken identification.

We affirm.

On June 22, 1967, at approximately 12:30 a.m. the complaining witness, Mrs. River Lee Bully, was attacked by two men on her way home from her aunt's house in the vicinity of 4500 South Wells Street in Chicago. The defendant, whom she later identified at trial, struck her across the shoulder with a sawed-off shotgun. In the ensuing struggle, the top of Mrs. Bully's purse was ripped off by her attackers, and approximately $35 was taken. During the attack the other man placed a pistol to Mrs. Bully's head and attempted to fire the gun three times, but it did not discharge.

Rachel Spirer, Mrs. Bully's aunt, heard some shouting and attempted to ward off the assailants by shouting at them from

her open front door. Taylor responded by firing the shotgun into Mrs. Spirer's door, wounding Miss Eddie Horne, Mrs. Bully's cousin, who was inside the house. After the shooting, the two men fled down 45th Street.

Mrs. Bully's uncle called the police, who arrived shortly thereafter. Mrs. Bully informed the police of the direction in which the men had fled and joined the two officers in their squad car in an attempt to track down the two men. As the squad car proceeded down 45th Street, Mrs. Bully spotted the defendant and another man in a parked car approximately one-half block from the occurrence and stated "that is him" or "that is them." The defendant and the other man jumped out of the parked car and fled in opposite directions. After a chase and a struggle, Taylor was finally subdued by the police and was brought back to the squad car where Mrs. Bully identified him as the man who had robbed her. The police were unable to apprehend the other man. Neither the shotgun nor the stolen money was recovered.

Defendant first argues that it was error, requiring reversal, not to have provided him with counsel at certain pre-indictment confrontations in which he was identified as the robber by Mrs. Bully and Jesse Smith.

In Kirby v. Illinois (1972), 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877, the Supreme Court held that an accused is not entitled to counsel at an identification confrontation that takes place prior to indictment. And even prior to Kirby, this was the rule in Illinois. In the instant case, defendant's confrontation with the two State witnesses took place before indictment. Therefore, failure to provide him with counsel was not error.

In his second contention, the defendant argues that the pretrial confrontations were so unnecessarily suggestive and conducive to mistaken identification that he was denied due process of law. The defendant relies on Stovall v. Denno (1967), 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967, which held that whether there has been a violation of due process in the conduct of a confrontation

depends on the totality of the circumstances surrounding it. In commenting on Stovall, the Supreme Court in Kirby stated:

> When a person has not been formally charged with a criminal offense, Stovall strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime. 406 U.S. 682, at 691.

Defense counsel challenges the in-court identifications of Taylor by Mrs. Bully and Jesse Smith on the ground that these identifications were the product of confrontations which were unnecessarily suggestive and conducive to mistaken identification. Defendant's motion to suppress the in-court identifications was denied, and his later objections to the in-court identifications in the course of the trial testimony were overruled.

The defendant complains of three confrontations that took place: one in which Mrs. Bully was present, one in which Jesse Smith was present, and one in which both Mrs. Bully and Smith were present. Mrs. Bully saw Taylor as he was being brought back to the squad car after being apprehended. At this time Taylor was handcuffed and in the custody of two police officers. At the parking lot of the hospital, Taylor was exhibited alone to Jesse Smith. Taylor was still handcuffed and again accompanied by police officers. In a room on the second floor of the police station, Taylor was exhibited to Mrs. Bully, Jesse Smith, and other people at the same time. There was no lineup. Taylor was handcuffed to a chair, and police officers were again present. At all three confrontations Taylor was identified.

In Stovall, the court said that the practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, had been widely condemned. But circumstances are recognized in which prompt on-the-spot confrontation is proper police procedure. (People v. Prignano (1971), 2 Ill. App.3d 1063, 278 N.E.2d 128.) Mrs. Bully's identification of Taylor in the parked car and after he had fled and had been captured enabled the police to locate the suspect while Mrs. Bully's

memory of him was fresh. If Mrs. Bully had not identified Taylor as the robber, the police could have immediately resumed their search.

The procedures which the police used in exhibiting Taylor at the hospital parking lot and at the police station are less justifiable. However, Taylor had previously displayed resistance to the police by fleeing from them when he was recognized, resisting and fighting with them while he was being searched.

An in-court identification is not tainted by an improper pretrial confrontation when it has an origin independent of the confrontation. An in-court identification is independent of an allegedly improper pretrial confrontation when it can be shown that the identifying witness had observed the defendant before the confrontation took place. (People v. Robinson (1969), 42 Ill.2d 371, 247 N.E.2d 898, cert. denied, 396 U.S. 946.) In People v. Nelson (1968), 40 Ill.2d 146, 238 N.E.2d 378, the court found an independent origin for an in-court identification in the fact that the witness, a pharmacist, had seen the defendant in his store frequently over a five-month period prior to the illegal purchase of narcotics. In the instant case, Mrs. Bully testified that she had seen Taylor in the neighborhood approximately twice a week over a four or five-year period. Jesse Smith also testified that he had seen Taylor in the neighborhood many times.

The defendant argues that the trial court erred in not receiving testimony as part of the motion to suppress as to whether the in-court identifications of Mrs. Bully and Jesse Smith were tainted by any pretrial confrontations. We do not agree.

The trial court heard testimony at the hearing describing the circumstances surrounding the confrontations at the time of Taylor's arrest, in the hospital parking lot and at the police station. All the witnesses were subjected to cross-examination. The court decided that as a matter of due process,

these confrontations were not grossly suggestive or conducive to mistaken identification. The conclusion that there was little likelihood of misidentification at these confrontations was bolstered by the observation testimony of Mrs. Bully and Jesse Smith at trial.

The record shows that Mrs. Bully and Jesse Smith had adequate opportunity to observe the defendant. Smith's testimony about seeing Taylor in the early hours of June 23, 1970, in the vicinity of the robbery was positive. Mrs. Bully's testimony as to what Taylor was wearing at the time of the robbery was consistent and positive. Her description was corroborated by the testimony of arresting Officer Stahl. Under these circumstances, where Jesse Smith and Mrs. Bully had seen defendant many times before the crime was committed, had adequate opportunity to observe him, and were positive in their identifications, we will not set aside a conviction based on in-court identification when it appears that the police procedures did not lead to any mistaken identification. People v. Fox (1971), 48 Ill.2d 239, 269 N.E.2d 720.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Dempsey, P.J., and McNamara, J., concur.

56356

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|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |



# STATE OF ILLINOIS



# APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 12th day of April A. D. 1973, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

10 I.A. 3993

56356

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 11760 Agenda 73-13

| | | |
|---|---|---|
| People of the State of Illinois, | ) | |
| Plaintiff-Appellee, | ) | |
| vs. | ) | Appeal from Circuit Court Edgar County |
| Marion Victor Wheeler, | ) | |
| Defendant-Appellant. | ) | |

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MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

The defendant appeals an order of the circuit court of Edgar County denying post-conviction relief after an evidentiary hearing. We affirm.

The defendant was convicted upon his plea of guilty to Count I of an indictment charging him with theft of property with a value in excess of $150. Upon the acceptance of the plea of guilty after full admonishment, the defendant was sentenced to a term of not less than 2 nor more than 5 years in the Illinois State Penitentiary.

The defendant originally filed a pro se petition for post-conviction relief. Thereafter, the circuit court appointed counsel and amended petition for post-conviction relief was filed and that petition alleged that the plea of guilty was coerced.

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |

Although there are some procedural difficulties set forth in this case, such are disposed of by the order denying the post-conviction relief and the same need not be discussed in detail in this opinion. The trial court caused the amended post-conviction petition to be set for hearing; the defendant testified; and the substance of his testimony was to the effect that before he pleaded guilty in January of 1970 to the charged offense, the then sheriff of the county told the defendant in the presence of the defendant's father that if the defendant did not plead guilty, the prosecutor would send him to Menard as a "psychopath" for 3 to 5 years and then he would be returned to Joliet to serve out his former sentence upon which he was then on parole - the testimony being to the effect that a "psycho case" would not count against his former sentence. The defendant further testified that he had never been the subject of an inquiry concerning mental illness; that he knew nothing about the treatment of those that are sentenced to the Illinois State penitentiary for psychiatric care; and he further testified that the prosecutor or the state's attorney had not spoken to him concerning the alleged threat.

The defendant's father testified at the post-conviction hearing and the substance of his testimony was to the effect that on January 12, 1970, the date of the plea of guilty, the sheriff asked the father to talk to the defendant; that the sheriff did say to the father that if the defendant stands trial, the defendant would be sent to Menard and put "on the hill" for 5 years.

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| vs. | ) | |

According to the father's testimony, the sheriff further indicated that even upon release the defendant would be returned to an institution.

There is other testimony with reference to what appeared to have been plea negotiations, but the same are not relevant to the issue of coerced plea now under consideration.

At the post-conviction hearing, the trial court examined the record of the original proceeding and the report of the proceeding of the arraignment. This record indicates that before the defendant entered a plea of guilty, the state's attorney read the statute defining the offense to him; that the defendant was advised by the court of the possible penalty; that the defendant was advised of his right to a jury trial, to an attorney, to plead either guilty or not guilty and to be admitted to bond if he plead not guilty. At the time of the acceptance of the plea of guilty, the court inquired of the defendant as to whether or not he had ever been treated for any mental illness or mental disorder, and specifically interrogated the defendant with reference to the issue of whether or not his plea of guilty had in any way been coerced, if any promises or threats had been made against the defendant to induce his plea of guilty. The defendant responded in the negative.

Thereafter, at a hearing in aggravation and mitigation, the defendant's prior record was introduced and the state's attorney recommended a sentence of 2 to 5 years in the Illinois State Penitentiary, which was the sentence imposed.

The trial court found no coercion at the time of the plea of guilty and concluded that in the judgment of the court,

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based upon the record and upon the testimony, relief under the Post-Conviction Hearing Act should be denied. The written order in this case speaks in terms of allowing a motion to dismiss the petition for post-conviction relief. It is clear from the record, however, that the disposition intended by the court was a final order, denying relief under the Act, rather than a dismissal of the proceedings.

In People v. Walker, 6 Ill.App.3d 909, 286 N.E.2d 812, the court affirmed an order of the circuit court dismissing a petition for post-conviction relief without an evidentiary hearing. The court was there concerned with an allegation of coercion at the time of a plea and at the time of a jury waiver. The court concluded that since the transcript of the original proceeding was itself sufficient to refute the allegation of coercion, it was not necessary to conduct an evidentiary hearing on the question.

In this case, the record shows that the defendant received proper admonitions by the court at the time of his arraignment and sentence. The record clearly refutes coercive conduct that in any way is suggestive of a denial of constitutional rights.

In considering the issue of coercion at the time of the plea, the trial court may consider the record of the proceeding at the time of the acceptance of the plea. When considering that record, and the evidence adduced at the evidentiary hearing, the

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| vs. | ) | |

trial court could determine that there was no coercion. We cannot say that that determination was manifestly erroneous and the judgment of the circuit court of Edgar County should be, and the same is, affirmed.

JUDGMENT AFFIRMED.

SMITH, TRAPP, J.J., concur.

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |
| | ) | |
| HAROLD MERRYFIELD, | ) | HONORABLE |
| | ) | JAMES A. GEROULIS, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was originally charged by indictment with the crime of burglary, in violation of section 19-1 of the Criminal Code. Ill.Rev.Stat. 1965, ch. 38, par. 19-1. On February 17, 1967, he pleaded guilty and was admitted to probation for a period of five years, with a condition thereof that defendant serve the first five months at the Illinois State Farm at Vandalia. On June 11, 1971, a hearing was held on a rule to show cause why defendant's probation should not be revoked. After the hearing, his probation was extended for an additional period of two years, with a condition thereof that the defendant serve an additional six months at the Illinois State Farm, Vandalia. See Ill.Rev.Stat. 1969, ch. 38, pars. 117-1 and 117-2. Defendant appeals.

At the hearing on return of the rule to show cause, defendant was represented by private counsel. The assistant state's attorney informed the trial court that on February 24, 1971, defendant had been convicted of compounding a crime and resisting arrest, and that at the time of arrest, he was armed with a revolver. The defense attorney conceded that defendant had in fact been convicted of a subsequent offense, and, when called as a witness, defendant admitted his conviction for resisting arrest and that at the time of his arrest he did have possession of a revolver.

The public defender was appointed to represent defendant on appeal. He has now filed a motion for leave to withdraw, accompanied by a brief in support, pursuant to Anders v. California, 386 U.S. 738.

Copies of the motion and brief were mailed to defendant on October 24, 1972, and he was advised that he had until January 17, 1973, to file any additional points he might choose in support of his appeal. Defendant has not responded.

The public defender's motion to withdraw states that after reviewing the entire record, it was his belief that the only possible basis for appeal would be whether the defendant was denied procedural due process at the hearing on the rule to show cause why defendant's probation should not be terminated. On this point we said in People v. Morales, 2 Ill.App.3d 358, 360, 276 N.E.2d 391, 392:

> The procedure must establish that the defendant has been given notice and a copy of the charge, that he has had an opportunity to be heard and that a conscientious judicial determination has been made in accordance with procedural methods which include the right to counsel and a reasonable time to prepare a defense. People v. Walker, 122 Ill.App.2d 461, 259 N.E.2d 304.

Our study of the record indicates that the above procedure was followed by the trial judge in the case at bar. Defendant was given notice and a copy of the charge. He appeared at the hearing represented by a private attorney and voluntarily chose to testify. Defendant specifically admitted that during the period of his probation, he had possessed a weapon and that he had been convicted of resisting arrest. Defendant was also given an opportunity to present whatever other matters he might have deemed important. Proof of defendant's violation of probation was clearly established by defendant's own testimony as well as by the statements of counsel made in his presence. People v. Ward, 4 Ill.App.3d 631, 281 N.E.2d 703.

After a full examination of all the proceedings in accordance with the dictates of Anders, we conclude that the legal points raised are not "arguable on their merits" and that the appeal "is wholly frivolous."

The public defender is given leave to withdraw, and the judgment of the circuit court is affirmed.

A F F I R M E D.

(Publish abstract only.)

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT |
| Plaintiff-Appellee, | ) | OF COOK COUNTY. |
| | ) | |
| v. | ) | |
| | ) | |
| DEBORAH DUMAS, | ) | HONORABLE |
| | ) | LOUIS B. GARIPPO, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was convicted upon a plea of guilty of the charge of aiding an escape in violation of Ill. Rev. Stat. 1969, ch. 38, par. 31-7(b), and was sentenced to imprisonment for a term of not less than three nor more than ten years. The sole issue on appeal is whether the sentence was unduly harsh and severe and should be modified by the reviewing court under Supreme Court Rule 615(b)(4). Ill. Rev. Stat. 1969, ch. 110A, par. 615(b)(4).

The Report of the Proceedings shows that on February 14, 1972, defendant's attorney stated: "After a conference with Miss Dumas and with Mr. Ackerman, at this time we would ask leave of court to withdraw the plea of not guilty to indictment 70-3156, three counts, and enter a plea of guilty to that indictment." Discussion between counsel for defendant and the court indicated the defendant was to plead guilty to count one of the indictment, which charged a violation of chapter 38, paragraph 31-7(b). The court examined the defendant to determine whether the plea was voluntary and whether the waiver of a jury was voluntary and the court stated:

> I have indicated to your attorney that on a plea of guilty to this count in this indictment, on a plea of guilty that I would impose a sentence of not less than three and no more than ten years. In other words, it would be an indeterminate sentence or a spread sentence in the penitentiary, the minimum number of years would be three and the maximum would be ten years.

Defendant stated she understood this and the court accepted a plea of guilty as to count one of the indictment, adding it was

satisfied "from our conference, from the reading of the statement and from the testimony on the motion to suppress that there is a factual basis for the plea of guilty."

An affidavit of the trial judge, filed with the record, summarized the facts of the charge to which the defendant pleaded guilty as follows:

> On October 19, 1970, Deborah Dumas arrived at the Criminal Courts Building at 2600 S. California Avenue and went to Judge Richard Fitzgerald's court prior to court starting. The defendant had a prearranged plan with convicted murderer Gene Lewis, who had been previously sentenced to die in the electric chair, to smuggle a gun to Lewis. The defendant accomplished this by secreting a revolver inside a book in which the pages had been hollowed out. She (defendant) left the book and gun inside a desk drawer in Judge Fitzgerald's library, where it was picked up by Lewis who was scheduled to appear before Judge Fitzgerald that day.
>
> Lewis then waited until he got back into the court bullpen where he pulled the gun on Walter Makowski, the court bailiff. When Makowski balked, Lewis shot him to scare him, which he did. Lewis then forced Makowski to take him on the prisoner's elevator to the 7th floor courtroom of Judge Saul Epton.
>
> Once inside Judge Epton's courtroom, Lewis took another gun from Deputy Trella. Lewis then forced Assistant State's Attorney Michael Stevenson to become a second hostage. Lewis managed by threatening death to his hostages, to get into the 7th floor corridor. Once in the corridor, Lewis led his hostages toward the elevators. When a bystander, Attorney Leonard Karlin didn't move fast enough, Lewis shot at him, grazing him.
>
> As Lewis approached the elevators, Inv. C. Hamilton, Area 4 Homicide/Sex Unit, Chicago Police Department, stepped out from his hiding place in the corridor and yelled police. Inv. Hamilton then shot Lewis in the head, killing him. When the gun that was at Stevenson's head was recovered from the body of Lewis, it was discovered that the bullet at 12 o'clock in the cylinder had been struck by the firing pin but it had failed to discharge.
>
> By her action, the defendant Dumas endangered the lives of at least 2 judges, several bailiffs, 4 assistant state's attorneys, innocent bystanders in the corridors and courtroom and several police officers.

On February 28, 1972, another hearing was held at which the defendant presented evidence in mitigation. Josephine Davis testified she was the supervisor of the registration and reception department at the Miles Square Health Center and in that capacity supervised the defendant who was still employed there; during three years defendant was "a proper employee." James H. Jackson, the pastor of the Lively Stone Mission and Baptist Church, testified he was the defendant's grandfather and that defendant had the reputation of being "a fine girl in the community." E. R. Williams, pastor of the South Park Baptist Church, testified he had known her since the time he baptized her as a child and stated: "This young lady has impressed me as being one who has a future and she can make a contribution to society." The Reverend Thomas Abrams testified his congregation was at 3740 West Ogden Avenue and he thought defendant was "a wonderful person." Reverend Howard Dukes, 347 South Cicero, Way of the Cross Missionary Baptist Church, testified he had known defendant for 15 years and that the people in the community think she is "a wonderful person." Erma Little, a member of the congregation of the Lively Stone Baptist Church, testified defendant was "a very good person and very sweet."

Deborah Dumas testified on her own behalf. She had lived at 1940 West Monroe for 20 years, worked at Miles Square for three years, belonged to Lively Stone Baptist Church for approximately 14 years; she was married in June (the record is silent as to the identity of the spouse) and was in custody for "a month," which gave her time to "look over things" and "if I were given another chance that things would be much better"; she was five months pregnant.

When asked by the court what brought her to commit the crime to which she pleaded guilty, the defendant responded: "Well, at

that time during the years I had, I have had a record of nerves and things and at that time it was - well, like I said before, I thought that people didn't care and so at that time I didn't care." In sentencing the defendant the judge made it clear that "Deborah" was "certainly a little different." He pointed out that he realized she was a first offender with no previous record, that she had come to court with friends and relatives willing to stand up for her, that "she comes here certainly with standing in her family, in her church, and her community." However, on the other hand, the judge said he had to "weigh the seriousness of the crime." He pointed out that "as a result of what happened," there is no "safety right in the criminal court of Cook County," that "someone was killed here" (i.e., Gene Lewis), shots were fired "as a result of Deborah Dumas' act." The judge concluded his thoughts in the following way:

> * * * I have thought about it a great deal, I feel that the sentence that I had gone over with the attorneys in our conference, and as the result of the negotiated plea, that this is a negotiated plea, the fact that I had warned Miss Dumas of the consequences of the plea, and I told her what I thought the penalty should be, I took into consideration the facts Mr. Darragh had stated in the conference; further, some of these facts about the background of Miss Dumas came out in the motion to suppress evidence, which began my thoughts about who we were dealing with and the problem with respect to imposing a penalty, if a penalty ever had to be imposed, when I was listening to the motion to suppress.
>
> So I will impose the sentence that I had thought about, and I have thought about it since then, I think that there should be a sentence which in some way reflects the seriousness of the offense, and also a sentence which reflects the previous unblemished background of Miss Dumas. * * *

The Supreme Court has often stated that the authority to reduce sentences should be applied with considerable caution, for the trial judge ordinarily has a superior opportunity in

the course of the trial and the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed than do the appellate tribunals. People v. Taylor, 33 Ill.2d 417, 424, 211 N.E.2d 673; People v. Brooks, 51 Ill.2d 156, 168, 281 N.E.2d 326. The record indicates that the judge gave very careful consideration to the conflicting and competing considerations present here, that of the seriousness of the crime on the one hand and that of the defendant's otherwise good record and character on the other hand. Moreover, it should be noticed that it is undisputed that defendant agreed in advance to plead guilty if she were to receive the sentences the court actually did impose.

The trial judge gave proper consideration to the competing considerations present in this case and we find no reason to disturb the sentence.

The judgment is affirmed.

JUDGMENT AFFIRMED.

Abstract only.

10 I.A 3995

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE |
| Plaintiff-Appellee, | ) | CIRCUIT COURT OF |
| | ) | COOK COUNTY. |
| vs. | ) | |
| | ) | |
| JOANN JENKINS, | ) | HONORABLE |
| | ) | ROBERT J. DOWNING, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was originally charged by indictment with the crime of murder, but after trial before a jury, she was found guilty of the lesser included offense of voluntary manslaughter. Ill.Rev.Stat. 1969, ch. 38, par. 9-2(a)(1).* Defendant appeals from a sentence of three to nine years.

The public defender of Cook County, who was appointed to represent defendant on appeal, has filed a motion for leave to withdraw. The motion, supported by a brief pursuant to Anders v. California (1967), 386 U.S. 738, states that the only available issue possible on appeal would be whether the evidence established the defendant's guilt of voluntary manslaughter beyond a reasonable doubt.

The brief concludes that an appeal on this issue would be legally frivolous and without merit. Defendant was mailed a copy of the motion and brief on January 9, 1973. Defendant was

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* Voluntary Manslaughter. (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, ***

informed that she could file any points she might choose in support of her appeal by February 28, 1973. Defendant has not responded.

We have examined the record and concur in the opinion of defense counsel that the sole contention posited is without substantial merit. The point would be based on the absence of provocation by the deceased sufficient to establish voluntary manslaughter, but defendant herself testified that immediately before she had stabbed him in the heart with a knife, the deceased had pushed her and hit her repeatedly. This constituted adequate proof of provocation, and our review of the record does not disclose any additional grounds for appeal which are not also frivolous.

The motion to withdraw is allowed, and the judgment of the circuit court is affirmed.

A F F I R M E D.

(Publish abstract only)

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT, |
| vs. | ) | |
| | ) | COOK COUNTY. |
| RONALD HUDSON, Defendant-Appellant. | ) | HON. JOHN C. FITZGERALD, Presiding. |

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

In March 1965, defendant was found guilty at a jury trial of the crime of the unlawful sale of narcotic drugs and sentenced to a term of twenty years to forty years in the penitentiary. The judgment on direct appeal to this court was modified by a reduction in the sentence of imprisonment to a term of not less than 10 years nor more than 14 years, and as modified, the judgment was affirmed in June 1968. (People v. Hudson, 97 Ill.App.2d 362, 240 N.E.2d 156, cert. denied, 394 U.S. 1005.)

In October 1969, defendant filed, pro se, a petition pursuant to the Post-Conviction Hearing Act wherein he sought leave to proceed in forma pauperis. (Ill.Rev.Stat.1971, ch. 38, par. 122-1 et seq.) Defendant also stated in his petition, in a highly conclusory fashion, that his constitutional right to a fair trial was denied him.

The trial judge treated defendant's pro se petition as an application for post-conviction relief, and on January 30, 1970, the court appointed counsel for him. On June 23, 1970, a supplemental Post-Conviction Petition was filed.

In substance defendant in his pro se and supplemental Post-Conviction Petitions charged and has preserved for appeal in this court the following alleged violations of his constitutional rights,

namely: (1) that the People made knowing use of perjured testimony in securing the conviction of defendant and that in a jury trial such perjured testimony could easily have controlled the result of the trial; (2) that the Public Defender appointed to represent defendant on appeal failed to raise several alleged errors committed in the trial court which denied the defendant a fair trial and due process of law.

A motion to dismiss the pro se and supplemental Post-Conviction Petitions was filed by the People, on the grounds that the Petitions failed to allege any constitutional questions as required by the Post-Conviction Hearing Act; that those of defendant's allegations which might in their broadest sense be construed as raising constitutional questions were merely bare allegations which, on numerous occasions, had been held by the Supreme Court of Illinois to be not sufficient to require a hearing, and that the issues raised in defendant's petitions were res judicata since they could have been raised on appeal to this court from the judgment of conviction. Hearings on the People's motion were held on August 21, 1970 and September 16, 1970, after which the court entered an order dismissing the defendant's Post-Conviction Petitions.

Defendant appealed the dismissal of his Petitions directly to the Supreme Court, which transferred the cause to this court. (People v. Hudson, Ill.Supt.Ct. Doc.No. 56461, September Term, 1971; see also Sup.Ct.Rule 651, Ill.Rev.Stat. 1971, ch. 110A, par. 651, as amended July 1, 1971.)

We address ourselves to one threshold question, namely, whether defendant has adequately supported his petitions and made a substantial showing that his constitutional rights have been violated.

The Post-Conviction Hearing Act requires that a substantial showing must be made that the defendant's constitutional rights

have been violated; bare allegations or conclusions to that effect will not be deemed sufficient to require an evidentiary hearing. (People v. Hysell, 48 Ill.2d 522,272 N.E.2d 38.)

In People v. Pierce, 48 Ill.2d 48, 268 N.E.2d 373, the Supreme Court stated that:

> "The Post-Conviction Hearing Act requires that the petition shall clearly set forth respects in which the petitioner's constitutional rights have been violated and that the same shall be accompanied by affidavits, records or other evidence in support of its allegations, or the petition shall state why the same are not attached. We have held many times that unsupported conclusional allegations in a petition are not sufficient to require a post-conviction hearing under the Act and that the petition and supporting affidavits must make a substantial showing of the violation of a constitutional right before a hearing thereon is required. People v. Morris, 43 Ill.2d 124; People v. Arbuckle, 42 Ill.2d 177; People v. Brown, 41 Ill.2d 503; People v. Collins, 39 Ill.2d 286; People v. Satterwhite, 38 Ill.2d 138; People v. Evans, 37 Ill. 2d 27." (People v. Pierce, 48 Ill.2d 48, 50, 268 N.E.2d 373, 374.)

In the instant case, defendant did not file affidavits or other evidence in support of his allegations. Moreover, the record does not support the allegations contained in the defendant's Post-Conviction Petitions. Both defendant's pro se and supplemental Post-Conviction Petitions are replete with bare unsupported conclusional allegations which are not sufficient to meet the requirements of the Post-Conviction Hearing Act. (Ill.Rev.Stat. 1971, ch. 38, par. 122-1 et seq.)

Upon a review of the record, we are of the opinion that the contentions raised by defendant on appeal are either without merit or bare unsupported conclusional allegations and are not sufficient to meet the requirements of the Post-Conviction Hearing Act.

Our holding that defendant's pro se and supplemental Post-Conviction Petitions do not make a substantial showing that the

defendant's constitutional rights were violated is dispositive of this appeal and it is not necessary to consider individually the alleged constitutional errors urged by defendant.

We conclude that the court was correct in denying the relief requested in defendant's Post-Conviction Petitions. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.

No. 55607

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| McCLELLAND BISHOP, | ) | APPEAL FROM THE |
| | ) | CIRCUIT COURT OF |
| Plaintiff-Appellant, | ) | COOK COUNTY. |
| | ) | |
| vs. | ) | |
| | ) | |
| CANAL-RANDOLPH CORPORATION, et al, | ) | HONORABLE |
| | ) | DAVID A. CANEL, |
| Defendants-Appellees. | ) | PRESIDING. |

MR. JUSTICE McGLOON delivered the opinion of the court:

Plaintiff appeals from the final order of the circuit court of Cook County dismissing his action for personal injuries for failure to comply with a previous order of the court which required the plaintiff's presence at a pretrial conference. The trial court denied plaintiff's motion to vacate the dismissal.

The issue on review is whether the trial court abused its discretion when it dismissed plaintiff's cause of action because the plaintiff did not appear at a pretrial conference as ordered. Plaintiff questions the propriety of the dismissal as a sanction for his failure to appear. The defendants argue that the dismissal order was proper under Supreme Court Rules 218 and 219(c); Ill.Rev.Stat. 1971, ch.110A, pars.218, 219(c).

We reverse and remand.

On November 6, 1967, plaintiff, McClelland Bishop, filed his complaint for personal injuries against three of the four corporate defendants who are the present appellees. There was extensive discovery by way of interrogatories among the parties. In his amended complaint, plaintiff added the T. W. Construction Company as a defendant, which is also an appellee. All the defendants answered the amended complaint.

At a pretrial conference of July 17, 1969, the plaintiff refused the defendants' settlement offer of $4000. Plaintiff claimed that his actual loss was greater than the amount which the defendants offered. Discovery continued, and the court ordered the parties to mutually produce all relevant documents. The court also ordered the plaintiff to submit to an impartial medical examination, and the plaintiff complied with the order.

On May 19, 1970, the court set another pretrial conference for July 16, 1970, and entered an order requiring the plaintiff to be present at the conference. On June 18, 1970, on motion of T. W. Construction Company, the court set a summary judgment hearing for July 24, 1970. On July 16, 1970, the court dismissed the action for failure of plaintiff to appear at the pretrial conference. On September 30, 1970, plaintiff moved to vacate the order of dismissal. T. W. Construction Company opposed the motion to vacate and filed a motion to sustain the dismissal. The court denied the motion to vacate, and this appeal ensued.

The portion of the court's order of May 19, 1970, with which the plaintiff failed to comply provided:

> IT IS FURTHER ORDERED that the plaintiff and plaintiff's attorney *** and the defense attorney and a representative of the insurance carrier MUST be present. In the event there is no insurance carrier defendant MUST be present.
>
> IT IS FURTHER ORDERED that if plaintiff and plaintiff's attorney fail to appear at the same time, this cause will be dismissed under the provisions of Supreme Court Rules 218 and 219(c).
>
> IT IS FURTHER ORDERED that if defense attorney and a representative of the insurance carrier (or the defendant if he has no carrier) fail to appear at said time, plaintiff will be permitted to proceed to process this cause to verdict and judgment ****

Under Supreme Court Rule 219 the trial court has available to it several sanctions that it may use to insure that the parties comply with discovery orders. The various sanctions provide the trial court with flexibility so that the dual goals of full, effective discovery and trial on the merits may be realized. Dismissal is a drastic action. (Gillespie v. Norfolk & Western Ry. Co. (1968), 103 Ill.App.2d 449, 243 N.E.2d 27.) In the cases cited in which dismissals for failure to comply with pretrial orders were upheld on appeal or orders vacating dismissals were reversed, there was a persistent failure to abide by the orders of the court (Goldman v. Checker Taxi Co. (1967), 84 Ill.App.2d 318, 228 N.E.2d 177) or a general lack of diligence in prosecuting the lawsuit. Gall v. Flash Cab Co. (1968), 100 Ill.App.2d 64, 241 N.E. 673; Forsberg v. Braiterman

(1968), 101 Ill.App.2d 475, 243 N.E.2d 433.

In the instant case plaintiff had diligently prosecuted his case. The record shows that at previous pretrial conferences the plaintiff refused to accept $4000 as a settlement offer and insisted that $12,000 was the minimum he would accept. There was no indication that the defendants intended to increase their offer by the time of the July, 1970, conference. In his affidavit in support of the motion to vacate, plaintiff's attorney maintained that he had authority to enter into a binding settlement at the July, 1970, pretrial conference without the plaintiff's presence. He informed the court that the plaintiff's excuse for his absence was that he was out of town. The trial judge called the plaintiff's telephone number and was informed by someone that the plaintiff was at work and would not be home until his customary time for returning from work. The record does not explain this possible discrepancy as to the plaintiff's excuse.

We think that the prejudice to the plaintiff as a result of the dismissal far outweighs any prejudice to the defendants as a result of the case proceeding to trial. The motion of T. W. Construction Company for summary judgment was set for a hearing on July 24, 1970, approximately one week after the court entered the order of dismissal. T. W. Construction Company was also the only defendant to oppose plaintiff's motion to vacate the order of dismissal. Because of all the foregoing circumstances, we think the trial court abused its discretion in dismissing plaintiff's cause of action and in denying plaintiff's motion to vacate the order of dismissal.

We are aware of the need to preserve the integrity of pretrial procedures. But in the instant case plaintiff should not suffer dismissal where to allow the trial court to decide the case on the merits would not cause the defendants any demonstrable prejudice. Karnazes v. Volkswagen of America, Inc. (1971), 132 Ill. App.2d 722, --N.E.2d--.

Accordingly, the order of the circuit court of Cook County

is reversed and the cause remanded with directions that it be reinstated in its proper place on the trial call.

Judgment reversed and
cause remanded with directions.

Dempsey, P.J., and McNamara, J., concur.

10 I.A.3 998

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT |
| Plaintiff-Appellee, | ) | OF COOK COUNTY. |
| | ) | |
| v. | ) | |
| | ) | |
| ERNEST MOORE (Impleaded), | ) | HONORABLE |
| | ) | SAUL A. EPTON, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

After a bench trial, Ernest Moore (hereinafter "defendant") was convicted of possession of burglary tools, namely, a "slam puller," in violation of Ill. Rev. Stat. 1969, ch. 38, par. 19-2, and sentenced to a term of one to two years. On appeal his sole contention is that the evidence did not prove him guilty beyond a reasonable doubt.

Chicago police officer John Burge testified that on June 3, 1971, at about 5:30 in the morning, he and his partner, Officer Raymond Benkowski, were parked in the middle of the 7600 block of South Drexel Avenue in Chicago when he saw the defendant and the co-defendant, Spencer McKinney,* driving north on Drexel Avenue. At this time it was still light out, the street lights were still on. He noted there was no city sticker on the vehicle and the brake lights did not function. He and his partner then approached the vehicle, and, as they did so, the defendants left their vehicle and walked toward the officers. He explained to defendant that the brake lights on his vehicle were not functioning and asked him to produce a valid Illinois driver's license. Defendant said the license was in the vehicle and he and defendant went back to the vehicle, defendant opened the driver's side door and the officer then noticed a slam-type lock puller protruding from under the right front seat of the vehicle "after Mr. Moore opened the

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* McKinney was also found guilty but is not involved with this appeal.

door." He then arrested both defendants, handcuffed them and placed them in the back seat of the patrol car, asked defendant for the keys to the vehicle and searched the trunk, finding four whitewall tires and wheels, one Sears stereo tape cartridge player, with the serial number obliterated, 16 stereo cartridge tapes and a black carrying case. The vehicle belonged to defendant's brother, and defendant did produce an Illinois driver's license. Ownership of the tape was not ascertained; defendant "alleged" that he was the owner of it and said the lock puller was not his property but had been left in the car by a friend. The property in the trunk was not "new looking" but was in "a used condition."

Officer Burge described a slam-type lock puller as a metal apparatus with a free sliding heavy steel weight on it. One end of the piece of the equipment, a sheet metal screw, is fitted into the puller. That screw is subsequently screwed into the cylinder of a lock at which time it makes a firm contact with the lock itself. Then the sliding weight on the tool is slanted to the rear with sufficient inertia and force to pull the cylinder of the lock from its position. He also described how the apparatus is used: "You screw it into the lock, move the handle from front to rear creating a force which pulls the entire locking mechanism from the lock; then the ignition switch may be started with either a screwdriver, knife or any other object which you can move into the center of the switch to rotate it." A Ford automotive ignition lock cylinder was attached to the operating end of the lock puller when he observed it. A yellow-handled screwdriver was also lying on the floor of the vehicle.

Chicago police officer Benkowski testified and identified both defendants.

Defendant testified that he had parked his car "on the

corner" and was on his way to a fire which was in the middle of the block when he was stopped by two officers; the slim officer asked for his driver's license and he showed it to him, and Officer Burge left the squad car and proceeded toward his car which was parked on the corner; the officer was looking at the piece of paper on the window that indicated the license had been applied for, and he brought the slam puller, which was dismantled, out of the car; at that time the slam puller was in three separate parts, did not have an ignition on it and had a little blue part on the end; the slam puller was left on the floor by Bobby Wilson, who has since died of a stroke; the screwdriver was not on the floor but was in the trunk; the four tires and the stereo tape player came from a 1964 Catalina that he had just junked; the ignition "came out of the evidence police car" and was "subsequently planted" on him.

McKinney testified that he did not see the policeman take the objects out of the car; the officer showed the slam puller to him and defendant, he had no idea how it got into the car; he had seen slam pullers before and used them to snap dents out of a car.

Defendant first argues that there was insufficient proof that he knowingly possessed the burglary tools. However, the police officers observed the defendant in the car and saw him leave the car; they also saw part of the puller protruding from under the passenger's side of the front seat. Defendant testified that his brother had given him the car and that the articles found in the trunk were owned by defendant. We find defendant knowingly possessed the puller and the screwdriver.

Defendant next contends that there was no evidence that he intended to use the tools for breaking into an automobile with the intent to commit a theft therein. In People v. Faginkrantz,

21 Ill.2d 75, 79-80, 171 N.E.2d 5, 7, the court held that in the absence of a confession the requisite intent must ordinarily be proved by circumstantial evidence and that it was for the trial court to determine the credibility of the witnesses and the inferences to be drawn from the testimony.

In the instant case the circumstantial evidence was adequate to show criminal intent. The burglary tools, as the evidence made clear, could be used for breaking and entering. The illegal use to which a slam-type lock puller is put is to insert it into the ignition of an automobile so as to be able to quickly pull the ignition from its usual position, thus exposing the ignition switch which can then be activated with a screwdriver or a simple knife. The car then can be started and driven away. In the instant case the ignition lock of another car was actually attached to the tool at the time of the arrest. Moreover, defendant totally failed to offer any reasonable explanation for the presence of the tool in the car or the presence of the ignition lock on the tool. The other articles found in the car, the screwdriver, the tires, the stereo with a serial number erased and the tapes were also corroborative of criminal intent because inadequately explained by defendant. The trial judge, who was in the position to evaluate the testimony, had the following to say after passing sentence on defendant:

> In my opinion, Mr. Moore, your testimony was pure fiction, absolute fiction, not a word of truth in the whole business. Unreasonable and ridiculous. Fiction.

We conclude that the evidence presented proved beyond a reasonable doubt that the tools in question were burglar tools, that defendant had knowledge that the tools were in his possession and that the defendant intended to use the tools to commit a felony or theft. People v. Johnson, 88 Ill. App.2d 265, 283, 232 N.E.554, leave to appeal denied, 37 Ill.2d 625.

The judgment is affirmed.

AFFIRMED.

Abstract only.

58327

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT |
| Respondent-Appellee, | ) | OF COOK COUNTY. |
| | ) | |
| v. | ) | |
| | ) | |
| PABLO RIVERA, | ) | HONORABLE |
| | ) | REGINALD HOLZER, |
| Petitioner-Appellant. | ) | PRESIDING. |

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Pablo Rivera, hereafter called petitioner, pleaded guilty to the crime of robbery on October 26, 1965, and was placed on probation for a period of three years with the condition that he serve the first six months in Cook County Jail. On November 21, 1967, petitioner entered a plea of guilty to a charge of murder and was sentenced to a term of 30 to 60 years. On January 31, 1968, after a hearing on a Rule to Show Cause, petitioner's probation was terminated and he was sentenced to a term of 10 to 20 years consecutive to the murder sentence. On May 5, 1971, petitioner filed a pro se petition under the Post Conviction Hearing Act as to both of his convictions. Ill. Rev. Stat. 1971, ch. 38, par. 122-1, et seq. The State Appellate Defender was appointed to represent the petitioner and an amended post-conviction petition was filed. The petition alleged that petitioner's constitutional rights were violated at both of his pleas of guilty because he had a limited understanding of the English language. Upon motion of the State, the amended post-conviction petition was dismissed without an evidentiary hearing on August 16, 1972. Petitioner appeals that dismissal.

The State Appellate Defender has filed a motion to withdraw, supported by a brief pursuant to Anders v. California, 386 U.S. 738, which states that the only arguable issue on appeal would be whether the trial court acted properly in dismissing petitioner's amended post-conviction petition without an evidentiary hearing.

The brief concludes that an appeal on this issue would be legally frivolous and without merit. Petitioner was mailed copies of the petition and brief on January 11, 1973. He was informed that he could file any additional points he might choose in support of his appeal before February 28, 1973. He has not responded.

An evidentiary hearing is not required where the record fairly contradicts the allegations of a post-conviction petition. People v. Gaines, 48 Ill.2d 191, 268 N.E.2d 426. Petitioner's argument that he could barely understand the English language is contradicted by the record of both of the defendant's pleas of guilty. In petitioner's plea of guilty entered October 26, 1965, he stated that he had a wife and two children and that his wife was present in open court. Further, he engaged in a conversation with the trial judge regarding his employment. In petitioner's plea of guilty entered November 21, 1967, petitioner requested a conference with the court. In response to a question by the court, he stated that he did understand the English language. Petitioner answered all questions posed by the trial court in a knowledgeable and intelligent manner. Prior to the entry of the defendant's second plea of guilty, he requested and was granted an appointed attorney. Petitioner had also written a letter to the public defender in clear, understandable language. From the Behavior Clinic psychiatric report in the record it does not appear that Dr. Haines had any problems communicating with the defendant. The same report shows that the petitioner attended high school in New York for two years. Since the record clearly contradicts the allegations in the petitioner's post-conviction petition, a hearing was not required.

We have examined the record and concur with the opinion of petitioner's counsel that none of the issues thus raised has substantial merit, nor does this court's inspection of the record

disclose any additional possible grounds for appeal.

The motion to withdraw is allowed and the judgment dismissing the petition is affirmed.

AFFIRMED.

Abstract only.

NO. 57433

10 I.A.3 1011

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|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT |
| Plaintiff-Appellee, | ) | COOK COUNTY |
| | ) | |
| vs. | ) | |
| | ) | |
| ROBERT HALL, | ) | HONORABLE |
| | ) | RICHARD J. FITZGERALD, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (Second Division, First District):

Robert Hall, hereafter called defendant, was originally charged by indictment with the crime of attempt armed robbery in violation of Section 8-4 of the Criminal Code. Ill. Rev. Stat. 1967, ch. 38, par. 8-4. On September 17, 1969, the defendant withdrew his previously entered plea of not guilty and entered a plea of guilty to the indictment. He was placed on five years probation with the first nine months to be served in Cook County Jail. On August 12, 1971, and September 8, 1971, a hearing was held on a rule to show cause why the defendant's probation should not be revoked. After the hearing was concluded, the defendant's probation was revoked and he was sentenced to a term of five to ten years in the Illinois State Penitentiary. The defendant appeals, arguing that the People did not prove him to be in violation of his probation and that the trial court's refusal to permit closing argument by defense counsel denied him due process of law.

At the hearing on the rule to show cause why the defendant's probation should not be revoked the following evidence was adduced: Thomas Weinberger testified that on December 24, 1970, he was employed at the H & R Meat Packing Company, Chicago, Illinois. At approximately 2:00 P.M., when he attempted to leave the premises, he observed two men standing outside the door. As he went through the door, one of the men pushed him back toward the building and produced a gun. A

struggle ensued and Mr. Weinberger was hit on the head with the gun. While Mr. Weinberger lay on the ground, his checkbook and wallet were taken and he was told to get up or he would be shot. He was unable to move and the men left him and went into the building. Mr. Weinberger got up and ran toward his car, which was parked nearby. At that time, a third man came running across the front of the building after him carrying a large knife. Mr. Weinberger backed up his car and pulled out of the parking lot. When he observed the other men come out of the H & R Packing Company building, he attempted to pursue them in his car, but lost them.

Nathaniel Washington testified that on December 24, 1970, he was employed by the H & R Meat Packing Company of Chicago, Illinois. At approximately 2:00 P.M. he was in the icebox when the phone rang from the inner office. In answering the phone he got no response. He went into the office and was informed that a robbery had just occurred. He ran out after the robbers and saw the two men carrying a shopping bag they had taken from the office. The men ran and he attempted to pursue them. He positively identified Robert Hall, the defendant, as one of the men. He had previously known Mr. Hall from seeing him in the neighborhood but did not know his name. He identified the defendant's photograph from over 800 photographs which he viewed on several occasions. After the defendant's arrest, he again identified the defendant in a six-man lineup.

Ralph Rubenstein testified that on December 24, 1970, he was employed as a wholesale meat dealer at the H & R Meat Packing Company in Chicago, Illinois. At approximately 2:00 P.M., he was in his office when several men armed with a gun entered. The men immediately put him up against the wall and took $500 from his pocket. He was then forced to lie down on the floor, face down, while the men fled. Within seconds after

the men left, Mr. Washington came into the office from the cooler and attempted to follow the men. Mr. Rubenstein did not get a look at the face of either of the men who came into his office.

Detective Michael Hoke testified that on December 24, 1970, he was assigned to the case involving the robbery at the H & R Wholesale Meat Company, Chicago, Illinois. Mr. Washington was shown over 800 photographs and identified Robert Hall's photograph as one of the perpetrators of the robbery. Detective Hoke then placed the defendant under arrest.

Robert Hall, the defendant, testified that on December 24, 1970, he went downtown with Mr. Tucker. At approximately 1:00 or 1:30 P.M. he passed by the H & R Meat Packing Company on his way to the I.C. train going downtown. He denied robbing the H & R Meat Packing Company.

The defendant first argues that he was not proven to be in violation of his probation. At a revocation of probation proceeding, the fact that the defendant violated the conditions of his probation must be proven by a preponderance of the evidence. People v. Crowell, ____ Ill. 2d ____, ____ N.E. 2d ____ (No. 44844, decided November, 1972). A positive identification by one witness is sufficient to sustain that burden, even where contradicted by the accused. People v. Adams, 8 Ill. App. 3d 8, 288 N.E. 2d 724. The trial judge, who hears the evidence and sees the witnesses, is in a far better position to judge the credibility of the witnesses than is the reviewing court. A reviewing court will substitute its judgment for that of the trial court only when the testimony is contrary to the manifest weight of the evidence. People v. Guido, 25 Ill. 2d 204, 184 N.E. 2d 858. In the case at bar, we have carefully reviewed the record and are satisfied that the defendant was proven to be in violation of his probation by a preponderance of the evidence.

The defendant's second contention is that he was denied due process of law by the trial court's refusal to permit a closing argument. After all the testimony at the hearing was concluded, the trial judge started to make a finding. The defense attorney interposed and asked, "Your Honor, could I please make a closing argument if we have enough time?" The trial court responded that a closing argument was not necessary and then made its finding without further statement from defense counsel. In People v. Wesley, 30 Ill. 2d 131, 195 N.E. 2d 708, the Supreme Court held that when a case is tried before the court, the matter of permitting oral argument rests in the sound discretion of the trial court and it is neither an abuse of discretion nor prejudicial to a defendant for the court to refuse to hear oral argument when the proof of guilt is overwhelming.

In the case at bar, the testimony is overwhelming that a robbery occurred on December 24, 1970, at the H & R Meat Packing Company in Chicago, Illinois. Mr. Washington's identification of the defendant, whom he had previously known, was positive and credible. Under these circumstances, the trial court's failure to hear oral closing arguments was not prejudicial to the defendant and is not reversible error.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Publish abstract only.

72-255

UNITED STATES OF AMERICA

State of Illinois )
Appellate Court ) ss.
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On April 11, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 72-255

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

| | | |
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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | Appeal from the Circuit Court of the 19th Judicial Circuit, Lake County, Illinois. |
| v. | ) | |
| EDWARD McCORMICK, a/k/a EDWARD L. McCORMICK, Defendant-Appellant. | ) | |

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Edward McCormick, a/k/a Edward L. McCormick, pleaded guilty on November 11, 1971, to burglary under one count of a multi-count indictment. He was sentenced to 1 year to 1 year and 4 months in the penitentiary in accordance with a negotiated plea initiated by his appointed counsel and the State's Attorney and accepted by the court. After pronouncing sentence, the court was requested to recite that defendant would get credit for time served from October 6, 1970, for the stated purpose of assisting the parole department. The court did so and further ruled that the sentence would run concurrently with the parole violation sentence which the defendant was then serving.

On December 6, 1971, defendant filed a motion to vacate the plea and judgment alleging that the parole agent had indicated at the time of the negotiated plea that the time to be served under the parole violation sentence would expire on or about February 22, 1972; that this representation induced the plea; and

that in fact the unexpired term on the parole violation sentence was an additional 15 months. The court denied defendant's motion. Counsel from the Illinois Defender Project was appointed to represent defendant in his appeal.

Appointed counsel has moved to withdraw pursuant to People v. Jones (1967), 38 Ill.2d 384, based on Anders v. Calif., 386 U.S. 738. Defendant was notified that he could file a pro se brief but has not done so.

We have reviewed the record together with counsel's motion and authorities cited. We grant the motion to withdraw and affirm the judgment below.

The record clearly shows that defendant entered his plea of guilty after a full and correct admonishment by the court, and in accordance with negotiations which did not relate to the disposition of any parole violation as a part of the agreement. The court lacked jurisdiction to alter the administrative decision under which the defendant lost good time credit under the ruling of the Parole Board. (Morrissey v. Brewer (1972), 33 L.Ed.2d 484, 494; Ill.Rev.Stat. 1971, ch.108,sec.204(e).) It is clear that the court considered the parole violation only in terms of the imposition of concurrent sentences and not as a limitation on the sentence to be approved in this case.

The trial court did not abuse its discretion in denying defendant's request to withdraw his guilty plea. People v. Walston (1967), 38 Ill.2d 39, 42-44.

Motion to withdraw allowed, judgment affirmed.

THOMAS J. MORAN, J. and GUILD, J. concur.

No. 56282

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|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY |
| vs. | ) | |
| DONALD WRIGHT, Defendant-Appellant. | ) | HONORABLE JAMES M. BAILEY, PRESIDING. |

PER CURIAM (Fifth Division, First District):

Defendant was indicted for attempt murder in violation of section 8-4 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 8-4.) After a bench trial, the defendant was found guilty and sentenced to a term of one to ten years.

On appeal, the defendant argues that he was not proven guilty beyond a reasonable doubt because the identification testimony was insufficient and because his conviction was based upon the weakness of the defense rather than the strength of the State's case.

The evidence is summarized. For the State: Joseph Fine, a Chicago police officer, testified that on September 12, 1970, he was on duty with his partner, George Bilecki. After receiving a radio call, they proceeded in a marked squad car to 11148 South Ashland, Chicago, Illinois. As they approached the intersection of Ashland and Pryor, he observed three youths on the front porch of a frame, two-story house. The area was lighted by a street light on the corner. He identified the defendant, who was approximately 35 feet from him, as one of those men. He further testified that the defendant was wearing a gray and white striped shirt, with dark striped trousers and a black vest, that one of the other men was wearing a sleeveless, orange colored sweatshirt. He could not tell what the third man wore, since he had only a glimpse of him. Fine called to the men to halt. The defendant then turned and fired two shots at the officers, hitting their squad car. The officers returned the fire with three shots. The defendant entered the building, making a motion with his right hand as if he were

throwing something away in the hallway. Fine testified that at this point he observed the defendant's face for two to three seconds. Fine testified that there was a light on in the hallway behind the defendant. Other officers arrived and the defendant and several other men were arrested as they came out of the house. A .38 caliber, rusted revolver with three live shells and two expended shells,was found in the hallway where the defendant made the motion with his hand. The gun was not dusted for fingerprints because of the rust.

George Bilecki, a Chicago police officer, testified that on September 12, 1970, while he was on duty with his partner, Joseph Fine, they responded to a radio call to the corner of Ashland and Pryor. As they approached, Bilecki observed a group of six or seven men running toward the squad car. They stopped and three of the men ran up the stairway up onto the porch of the house at 11148 S. Ashland, while the others started to go into the gangway. The corner was lighted by a street light at the intersection located directly opposite the house in question. Fine called to the men to halt and one of them, later identified as the defendant, turned and fired two shots at the officers, striking their marked squad car. The defendant was wearing a black shirt with dark, striped trousers and a black vest. The officers returned the fire with three shots and the men entered the house. He testified that the light in the hallway was not on. Other officers arrived and the defendant and several other men in the house were placed under arrest. A revolver was found on the front porch of the house in question. Officer Bilecki had a view of the defendant's face for approximately fifteen seconds from a distance of approximately 35 feet.

For the defense: Michael Williams testified for the defense that on September 12, 1970, he was living at 11148 S. Ashland with his family. In the late evening he was playing cards with the defendant and several other people when they heard shots. Dwight Green and the defendant went outside onto the front porch. As they exited the house,

Michael Williams heard shots and then heard the police call for everyone to come out of the house. He testified that on the evening in question he did not see a gun in the defendant's possession.

Samuel Williams testified for the defense that on September 12, 1970, he was also living at 11148 S. Ashland. In the late evening he heard shots fired. He then ran upstairs to see what was going on. Dwight Green and the defendant went out the front door of the home and he immediately heard gunshots. He then heard the police order everyone out of the house. He did not see a gun in the defendant's possession.

Oral Williams testified for the defense that on September 12, 1970, she lived at 11148 S. Ashland. Early in the evening she heard shots and called the police from a neighbor's house. She was not present in the home when the police arrived.

Wayman Little testified for the defense that he was a cell-mate of the defendant in Cook County Jail, that prior to the defendant's release, he and the defendant exchanged shirts, that he gave the defendant a black, long-sleeved shirt with white stripes and the defendant gave him a solid black, short-sleeved shirt.

Dwight Green testified for the defense that on September 12, 1970, he was playing cards with the defendant at 11148 S. Ashland when they heard shots, that he and the defendant went out on the front porch as the police arrived, that when the police came around the corner, they fired several shots at them without cause. He denied that anyone fired at the police.

Donald Wright, the defendant, testified that on September 12, 1970, he was playing cards at 11148 S. Ashland when he heard shots. He went out onto the front porch with Dwight Green as the police approached the house. As the police came into view, they immediately stopped and fired several shots at him. He denied that anyone fired at the police. Wright testified that on September 12, 1970, he was wearing a short-sleeved, solid black shirt and black pin-striped pants.

The defendant first argues that his identification was insufficient to support his conviction beyond a reasonable doubt. The defendant reasons that the police officers' view of him for a short period of time at some distance and with poor lighting renders the identification testimony insufficient. In criminal offenses, the sufficiency of the identification of the accused is a question for the trier of fact and courts of review will not reverse that decision unless the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. (People v. Jackson (1963), 28 Ill.2d 566, 192 N.E.2d 873.) Here two well-trained Chicago police officers observed the defendant under adequate lighting conditions for an adequate period of time to fix his features. Both officers gave a detailed description of the clothing that the defendant was wearing. Further, the defendant was arrested within minutes as he came out of the house in question. It was for the trier of fact to make the initial determination as to whether or not the officers had a sufficient period of time to observe the defendant so as to fix his identity. In this case, the trial court determined that the two police officers did have a sufficient period of time to adequately identify the defendant. It cannot be said that that determination is erroneous. People v. Gaiter (1972), 8 Ill.App.3d 784.

The defendant also argues that there was a direct contradiction in the testimony of Officer Fine and Officer Bilecki as to whether or not there was a light on in the front hall of the house from which the defendant fired at them. This contradiction in the testimony at best raises the question of credibility, which is a matter for the trier of fact to determine. People v. Thomas (1970), 127 Ill. App.2d 444, 262 N.E.2d 495.

The defendant's second argument is that his conviction was based upon the weaknesses in his case rather than the strength of the State's case. To support this argument, the defendant cites two statements taken out of context which were made by the trial judge during

his summation of the evidence. The trial judge stated that the State's evidence may have been weak, but that at the end of the case he had no doubt as to the defendant's guilt. He further stated that the defendant's story was unbelievable and that there was no explanation of how the gun got into the hallway. The defendant argues that these statements demonstrate that the trial judge improperly based his finding upon the weaknesses of the defense case. We disagree. A reading of the entire summary of the trial judge's statements demonstrates that he meticulously considered all of the evidence and was careful to preserve all of the defendant's rights. The defendant was proven guilty beyond a reasonable doubt and was in no way prejudiced by the remarks of the trial judge. People v. Horton (1964), 30 Ill.2d 293, 196 N.E.2d 649; People v. Bradley (1970), 131 Ill.App.2d 91, 266 N.E.2d 469.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

ABSTRACT ONLY.

55891

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|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | APPEAL FROM THE CIRCUIT |
| Plaintiff-Appellee, | ) | COURT OF COOK COUNTY. |
| | ) | |
| vs. | ) | |
| | ) | |
| TOMMY PETERSON, | ) | Hon. Robert J. Collins, |
| | ) | Presiding. |
| Defendant-Appellant. | ) | |

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

An indictment returned against Tommy Peterson (defendant) contained two counts of murder (Ill.Rev.Stat. 1969, ch.38, pars.9-1 and 9-1(a-2)), one of felony murder (Ill.Rev. Stat. 1969, ch.38, par.9-1(a-3)) and one for armed robbery (Ill.Rev.Stat. 1969, ch.38, par.18-2.) At a bench trial, he was found guilty of murder but not guilty of felony murder and armed robbery. Since he was then 16 years of age, the court sentenced him to imprisonment from 14 years to 14 years and one day with commitment to the Juvenile Division of the Department of Corrections including provision for transfer to the Adult Division of said Department and imprisonment in the penitentiary if not discharged from imprisonment prior to his 21st birthday.

On his appeal, defendant contends that there was a failure of proof in that a gun which the State alleged he had was not the murder weapon; the prosecution denied him a fair trial by failing to correct the impression that defendant's gun was the murder weapon when actually it was not and he was denied effective assistance by his trial counsel. The State responds by contending that defendant was proved guilty beyond a reasonable doubt; he was not denied a fair trial and he was more than adequately represented by his privately retained counsel.

Before trial, defendant's counsel made a motion to suppress statements made by defendant to the police and to an Assistant State's Attorney, including one in writing. The parties stipulated that the evidence on the motion to suppress would be heard at the same time as the case in chief.

We will first summarize the testimony pertaining to the case in chief. The first witness called by the prosecution was a woman who lived on the north side of North Avenue in Chicago. About 10:00 p. m. on September 19, 1970, she was sitting in her living room. From her window she saw three Negro men sitting on a bench across the street facing toward her. She also saw a Caucasian pedestrian walking west on the south side of North Avenue. As he approached, one of the men from the bench got up, walked toward him and said a few words. This man pushed the pedestrian then took out his gun and shot him twice. The victim fell and the person with the gun then shot him again. She stuck her head out of the window and shouted at the killer who ran across North Avenue in a westerly direction. He shot at her without effect. She was unable to identify the gunman or to describe his clothing. The parties stipulated that the coroner's report showed that the deceased suffered one bullet wound in the chest, one in the abdomen and one in the lower back.

A group of three young people were in the vicinity on the north side of North Avenue and Latrobe Street, which is the first street to the west. One of them, a young man 15 years old, testified that he heard shots or some noise. A Negro boy then came running around the corner and shouted, "Stop or I'll shoot" or something like that. He was dressed in a "wet-look jacket", fancy bell bottom pants and "chug" boots. The witness had a good look at this person and described his height as about 5 ft. 3 in.

On the next day, he identified this young man, the defendant, in a lineup at the police station. He saw a gun in the hand of the man who ran around the corner but did not see him use the gun.

A young woman 19 years of age was in the same area. She heard three noises like fire crackers and saw a young Negro man about 5 ft. 5 in. in height come running around the corner. He shouted, "Stop or I will shoot" or something in that order. She did not see a gun in his hand. He was wearing a "wet-look" dark jacket, blue denim bell bottom trousers and "loud sounding shoes." She then went around the corner and saw the victim lying on the sidewalk on the south side of North Avenue about 15 or 20 feet east of the bench. She was unable to identify the defendant.

The third witness in this group was a young man 15 years old. He heard three shots and then saw a young Negro man some 5 ft. 3 in. in height come running around the corner. He was wearing jean pants with bell bottoms and a black "wet-look coat." The witness saw a gun and saw the young man shoot the gun. He said, "Halt or you will get the same." This witness was present at the police lineup and testified on direct examination that he identified one of the four men he saw there. However, defendant's counsel showed on cross-examination that he told the grand jury that although he had identified one of the men in the lineup, he could not identify him positively at the time of his testimony before the grand jury.

The remaining witnesses for the prosecution included two persons indicted with defendant. Both of them testified that they were in the company of the defendant seated on the designated bench at the time in question. Both testified that they

had been promised by the prosecution that the indictments against them would be dismissed in return for their testimony. Both testified that they had known the defendant for some time and that they knew that he was then in possession of a .25 caliber automatic pistol. One of them testified that when they alighted from a bus and went over to the bench, they told defendant to stay a distance away from them. Both saw the pedestrian walking west and saw defendant leave the bench and accost him. Both heard shots and saw the victim fall. They were then 25 or 30 feet away. They did not see any weapon in the hand of the victim. One witness saw fire coming from defendant's hand but did not see defendant shoot anybody. Another witness said that defendant shot twice but later receded from this on cross-examination.

Additional witnesses were called for the prosecution. Their testimony will be the subject of a later explanation relating to defendant's motion to suppress. Defendant called his brother and his mother as witnesses. The mother testified that when defendant left home that night and when he returned he was wearing a pair of white pants with brown flowers on them and a white jacket with a belt.

Defendant testified in his own behalf. He stated that he wore flowered pants and a leather coat. He denied that he shot anybody at the time and place in question. He was present on the bench with his two friends. He also saw the pedestrian walking on North Avenue. At that time, he was in possession of a .25 caliber automatic pistol which he said was the property of his grandmother and that he had taken it from the house that evening. He heard gunshots at the time and place in question. He did not see anyone fire a gun and did not run around the corner with the gun in his hand. While sitting on the bench,

he heard two shots and one of his friends ran and then the other. When he turned around, he did not see them and he ran too. He testified that he carried the gun in his shoe until he brought it home that night.

Based upon this evidence, the trial court found defendant not guilty of armed robbery and not guilty of felony murder, but guilty of murder. We approve this result. In our opinion, there is ample evidence to constitute proof of guilt of murder beyond a reasonable doubt. The testimony of defendant is unconvincing. At best, it served merely to create a conflict or a question of credibility which it was the duty of the trial court to resolve. We cannot say that the evidence presented to the trial court is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. Under these circumstances, it is "axiomatic" that we will not disturb the finding of guilty. (People v. Glover, 49 Ill.2d 78, 84, 273 N.E.2d 367.) See also People v. Donel, 44 Ill.2d 280, 283, 255 N.E.2d 454.

We will next consider defendant's contention regarding the murder weapon. As regards the motion to suppress defendant's statements, there was testimony in behalf of defendant that he was subjected to physical coercion by the police, as well as testimony to the contrary by an Assistant State's Attorney and by a number of police officers. At the conclusion of all the evidence, the trial judge sustained the motion to suppress defendant's statements. He ruled that unfair procedure had been followed in that defendant had refused to make a statement after being given Miranda warnings. The Assistant State's Attorney then, in the presence of defendant, took statements from both of the young men who had accompanied him. When this

had been done, defendant then agreed to and did make a statement. In reaching this result, the trial court exhibited a commendable desire to insure complete fairness to the defendant and to protect all of his rights with vigilance.

The argument made by defendant regarding the murder weapon is evolved by the curious and hardly laudable process of using a portion of the evidence heard on the motion to suppress and carefully disregarding the remainder. The undisputed facts are that as a result of defendant's own statement to the State's Attorney, two police officers went to defendant's home and brought back a gun. However, defendant also stated that he had lied to the State's Attorney and that the weapon which was thus brought to the police station was not the one used on the night in question. Defendant also stated that after the incident he had taken a taxicab and had thrown the weapon he had previously used out of the cab. Defendant's argument in this court is thus predicated on only one of the statements made by him and totally disregards the other.

Defendant's brief repeats the statement many times that there was no proof of the identity of the murder weapon and, therefore, no proof of guilt beyond a reasonable doubt. Actually, since the court sustained defendant's motion to suppress, he disregarded all of the evidence contained in the statements made by defendant to the police. It is patently absurd for defendant now to select one isolated portion of this evidence and attempt to depend upon it as demonstrating lack of reasonable doubt. Furthermore, the State had no duty to prove identity of the weapon used. As indicated, the evidence adduced proved defendant's guilt beyond reasonable doubt.

sufficient beyond reasonable doubt and that no trial errors intervened. The judgment appealed from is accordingly affirmed.

Judgment affirmed.

BURKE, P. J., and EGAN, J., concur.

The above statement also serves to refute completely the assertion made by defendant that he was denied a fair trial. Analysis of this record, as above pointed out, shows that the State was not unfair to defendant in any manner and that no erroneous impression was ever given to the trial judge by the evidence of guilt. On the contrary, the record shows that defendant's trial was completely fair and that the trial judge had an excellent and complete grasp of all of the evidence before him.

We similarly reject the argument that defendant was not properly represented by his counsel. The rule has been stated many times that there must be a showing of "extraordinary incompetence" by defendant's trial counsel. (People v. Rodrigquez, 126 Ill.App.2d 231, 235, 261 N.E.2d 762.) Our Supreme Court has held that the representation by counsel which denies defendant a fair trial must be "***of such low calibre as to amount to no representation at all or reduces the court proceedings to a farce or a sham***." (People v. Riojas, 47 Ill.2d 47, 49-50, 265 N.E.2d 865, citing People v. Bliss, 44 Ill.2d 363, 255 N.E.2d 405.) This situation does not exist in the case at bar. In fact, quite to the contrary, the record shows that defendant received able representation from his counsel. His trial lawyer presented successfully a motion to suppress defendant's statements; he conducted a thorough and professional cross-examination of the State's witnesses and he was both skilled and fortunate enough to obtain the minimum sentence for his guilt client. This case presents a situation in which the argument concerning ineffective trial representation should not have been made. Our review of the record convinces us that the evidence is

NO. 56043

10 I.A.3 1059

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT |
| Plaintiff-Appellee, | ) | COOK COUNTY |
| | ) | |
| vs. | ) | |
| | ) | |
| ROBERTO GARCIA, | ) | HONORABLE |
| | ) | PHILIP ROMITI, |
| Defendant-Appellant. | ) | PRESIDING. |

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Roberto Garcia (defendant) was found guilty of unlawful sale of a narcotic drug (heroin) and was sentenced to serve 10 years to 20 years. On appeal he contends that the People failed to establish a connection between him and the narcotics analyzed by the police chemist, and that his sentence should be reduced in accordance with the terms of the Illinois Controlled Substances Act. (Ill. Rev. Stat. 1971, ch. 56-1/2, par. 1100 et seq.)

Chicago Police Officer Schlobohn testified that he encountered the defendant on a city street at approximately 12:20 P.M. on November 9, 1970 and that, as an undercover narcotics police officer, he purchased a packet of white powder from defendant for $50. The officer testified that he was working with Officers Brown, Dura, and McKelvey; that, after joining the other officers, he gave the packet to Officer Brown; that a field test was made of the contents of the packet; and that the test resulted in a positive reaction for an opium derivative. The four officers proceeded to their office at 1121 South State Street in Chicago where the packet was inventoried and placed into a narcotics property envelope. The officers either signed or initialed the envelope and the packet, and the envelope was turned over to the Crime Laboratory by Officers Brown and Dura, the latter of whom had prepared a receipt which they received from the

laboratory. Officer Schlobohn identified the envelope, the packet, and the receipt at trial, which were thereafter entered into evidence, as was the laboratory report; all of the items which were introduced into evidence were entered expressly with no objection by defendant.

Officer Brown substantially corroborated the testimony of Officer Schlobohn as to the purchase of the packet, the field test performed, the inventorying and enveloping of the packet, and the submission thereof "to the Crime Laboratory by myself and my partner, Donald Dura." The witness identified both the packet, which bore his initials, and the narcotics envelope, which bore his signature, and stated that they were in the same condition as when submitted to the laboratory, except for a piece of tape covering white powder. The witness also signed the inventory sheet, as did Donald Dura.

Defendant was arrested for the instant matter on December 2, 1970 by Officer Brown near the location where the sale took place, and out of the presence of Officer Schlobohn.

A stipulation was entered between the prosecution and the defense, as follows:

> "MR. SALAS (Assistant State's Attorney): It is stipulated, your Honor, that if Chemist Charles Vondrak, of the Chicago Police Department Crime Laboratory Division, were called to testify, he would testify that on November 9, 1970, Officers Dura and Brown, of the Vice Narcotics detail, submitted an exhibit to the laboratory for an examination. That this exhibit was one foil packet containing 0.25 grams of white powder. That the exhibit was subjected to various chemical identify tests, and that the results were that the exhibit was found to contain diacetyl morphine hydrachloride, commonly referred to as heroin.
>
> "This would be the stipulation between the People of the State of Illinois through Edward V. Hanrahan, State's Attorney, * * * and the defendant, through his person and through his counsel, * * *
>
> "MR. MISSIRLIAN (Defense Attorney): So stipulated.
>
> "MR. SALAS: Also, your Honor, be it stipulated

> that if--. We are stipulating as to the chain of evidence, your Honor. That if Officers Brown-- I mean if Officer Dura were called to testify, he would testify that he assisted in acquiring the packet from Officer Schlobohn and did have possession of that and transferred it to the Crime Laboratory, where he received the inventory sheet.
>
> "MR. MISSIRLIAN: So stipulated (sic)."

Defendant testified in his own behalf and denied that he sold Officer Schlobohn narcotics on the date in question.

Defendant's first contention, that the stipulation was fatally defective for failure to relate the packet referred to therein to that testified to and identified by Officer Schlobohn, and that the other evidence in the case does not cure that defect, is without merit.

It is well established that a determination of the sufficiency of the evidence to sustain a conviction must be made from the entire record in a case; it does not depend upon the strength or weakness of any particular item of evidence. People v. Luckett, 24 Ill. 2d 550, 554, 182 N.E. 2d 696, 698. While it is true that the stipulation in the instant case did not directly link the narcotics analyzed in the tinfoil packet referred to in the stipulation to the packet identified by Officer Schlobohn at trial as having been received from defendant on November 9, 1970, the testimony of Officer Brown that Officer Dura assisted in submitting the packet received from Officer Schlobohn to the Crime Lab on November 9, 1970, together with that portion of the stipulation that Officer Dura assisted in acquiring "the packet" referred to in the stipulation from Officer Schlobohn, sufficiently connected defendant to the packet referred to in the stipulation. The stipulation, Officer Brown's testimony concerning the field test, the delivery of the packet to the Crime Lab, and the receipt of the inventory sheet therefor show conclusively that the packet of white powder received by Officer Schlobohn was the packet of

narcotics analyzed by the chemist and received into evidence at trial. The defect in the stipulation was therefore cured by the other evidence in the case.

The cases cited by defendant in support of his contention are not in point. See People v. Maurice, 31 Ill. 2d 456, 202 N.E. 2d 480; People v. Anthony, 28 Ill. 2d 65, 190 N.E. 2d 837; People v. Brown, 66 Ill. App. 2d 317, 214 N.E. 2d 289; People v. Woessner, ____ Ill. App. 2d ____, 268 N.E. 2d 508; United States v. Panczko, 353 F. 2d 676.

We agree with the defendant's second contention that this cause should be remanded for a re-determination of the sentence.

In the recent case of People v. Chupich, ____ Ill. 2d ____, ____ N.E. 2d ____ (Docket #44361, May 1972), the Supreme Court held that a case has been "finally adjudicated" within the terms of Section 601 of the Illinois Controlled Substances Act when the last direct appeal has been decided or when the time for filing such appeal has run. (Ill. Rev. Stat. 1971, ch. 56-1/2, par. 1601.) Thus, although defendant was tried, convicted and sentenced prior to the effective date of the Act, the pendency of this appeal and the fact that the Act provides less harsh penalties than those prescribed by the statute under which defendant was convicted, give the defendant the right to be sentenced under the provisions of the Act. (Ill. Rev. Stat. 1969, ch. 38, par. 22-40; Ill. Rev. Stat. 1971, ch. 56-1/2, par. 1401 (a)(b).) Since the evidence shows that defendant sold substantially less than 30 grams of heroin to Officer Schlobohn, the minimum sentence for a first offense would be one year under the Act, whereas under the statute under which he was sentenced the minimum sentence was ten years.

Although this is defendant's third conviction on a narcotics charge and although the Act provides that a second or subsequent offense on a narcotics matter may enhance the penalties imposed,

the first two convictions occurred in 1958, for which defendant was sentenced to one year, and in 1963, for which defendant was sentenced to two to four years. (Ill. Rev. Stat. 1971, ch. 56-1/2, par. 1408.) It should be further noted that the minimum sentence actually imposed upon defendant below was the minimum sentence then prescribed by the statute, rather than the minimum of twelve years recommended by the People.

For these reasons the judgment of conviction is affirmed and the cause is remanded to re-determine defendant's sentence in light of the Illinois Controlled Substances Act.

Affirmed and remanded,
with directions.

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NO. 56513

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | APPEAL FROM CIRCUIT COURT COOK COUNTY |
| vs. | ) | |
| GEORGE W. COLES, Defendant-Appellant. | ) | HONORABLE KENNETH R. WENDT, PRESIDING. |

PER CURIAM (Second Division, First District):

After a non-jury trial, defendant George W. Coles was found guilty of armed robbery and sentenced to a term of not less than two nor more than six years. In this appeal, defendant argues that the evidence did not prove him guilty beyond a reasonable doubt, that he did not understandingly waive his right to be tried by a jury, and that he did not receive a fair trial because he was not advised of his right to counsel prior to a pre-indictment lineup.

The complainant, Clara Gartner, testified that on October 28, 1970, about 5:45 P.M., she was coming home from work with two sacks of groceries in her arms and left the grocery sacks between the entrance door and the screen door when she was unable to obtain entrance. As she was about to turn to try the front entrance to the apartment, she heard a voice behind her say not to move or make any noise. She turned around and saw "a young man, a round face, natural hairdo" who was "neatly dressed." She testified that the lighting there was bright. She observed that the man had a gun pointed at her. He said, "Give me your purse," and she handed the purse to him with her right arm and he hit her with the gun and she became unconscious. She described the robber as "dressed neatly with a shirt buttoned * * * a dark shirt, not a white shirt." During the robbery, six or seven dollars and a Carson Pirie Scott charge plate, alien identification card, library card, and a Michael Reese identification card were stolen. The following evening

she went to the police station with her husband and identified the defendant in a lineup as the man who had robbed her the previous evening. Her recollection of the lineup was that there were four persons in the lineup; that each came forward and said his name; that defendant was the only one in the lineup with a natural hairdo; and that she did not remember Larry Jones as being in the lineup and never identified him.

Chicago Police Officer Brian Lundin testified that, based on a call from an informant whom he had used approximately twelve times in gambling cases, he arrested the defendant on October 29. Larry Jones was also arrested and a search of his person resulted in the discovery of a .25 caliber revolver. The officer also testified that he had visited the scene of the crime and the lighting there was bright. There were five persons in the "show-up" at the police station and Mrs. Gartner identified the defendant, who was the number three man in the group, the middle person. Mrs. Gartner did not first identify Larry Jones as the one who had robbed her; Larry Jones did not look like the defendant, George Coles; but the police department's supplementary report did state in the original, which the witness had crossed out, that Larry Jones was identified as the robber.

Pearl Stevenson testified that she met the defendant, her son, by pre-arrangement, at the corner of 34th and Halsted Streets in Chicago at about 25 minutes after five on October 28, spoke briefly with him in his car and then they walked together to a nearby shoe store where she went in alone and remained for about 20 minutes. When she finished her shopping, she and her son, who had been waiting for her outside in the doorway, went to her home at 626 W. Garfield Boulevard, arriving about 6:30 or 25 minutes to seven. That day her son was dressed in an orange sweater, a red rust shirt, and a rust pair of pants.

George W. Coles testified on his own behalf that on October 28, he drove his mother to 69 West Washington Street, agreeing to meet her at 34th and Halsted Streets "when she finished," and went from there to a pool hall where he remained until about 5:00 P.M., when he left for 34th and Halsted Streets to meet his mother; this was about 5:00 P.M., but he was unsure "exactly what time it was." His mother got into the car and they talked briefly, and then they walked to the shoe store and he stayed outside while she went in for about 15 or 20 minutes. Then he drove his mother home, arriving "about 6:30." The following evening, about 9:30, the police came to his house, without a warrant, searched it, and arrested him, Larry Jones, and his brother, William Brisker. He was the third man in the lineup, the shortest man; everybody in the lineup except one person had a natural; each person stepped forward, said his name and address, made a half left turn, and then stepped back.

William Brisker testified that he was arrested on October 29 in his brother's apartment about 9:30 or 10:00 P.M. and was put in the lineup with about five or six people. He was on the end and George was about two or three down from him. He was told by the police that the woman had pointed him out, but he was not charged with the crime.

Elizabeth Jackson testified that she was arrested on October 29, 1970, at the Carson Pirie Scott store in Oak Lawn, along with Peggy Chapman, because they had a charge plate of the complainant which she got from John Carey and Maurice Fryer, and not from the defendant. However, Peggy Chapman did tell the police that George Coles had given them the card and at first the witness did not tell the truth to the police. She had known George Coles approximately two years and on one occasion had lived with defendant and his wife for two or three months.

The complainant was recalled to the stand and testified that one day when she went to court for an appearance, she heard the defendant's mother say "she was going to get witnesses that George was with her the whole day."

Officer Lundin was recalled and testified that on the night the defendant was arrested, defendant said he had been with his mother at home all day and that on another occasion -- he could not recall precisely when -- defendant's mother called the office and said George had been "home with her all day" and she also told him this personally on another occasion when Officer Brown was present.

Officer Frank Brown testified that, the day after the defendant was arrested, the defendant's mother told him that the defendant had taken her to the loop and stayed with her until approximately three or four o'clock; that neither the defendant nor his brother mentioned that the defendant had been with his mother at the time in question; that Mrs. Stevenson also said "she had a fellow that looked similar to Mr. Coles, and she was going to let me know where he was," but that he did not question her further because the three stories did not "coincide."

Defendant's first claim is that he did not understandingly waive his right to a jury. The record shows the following colloquy between the court and the defendant on the subject:

> "THE COURT: Mr. Coles, one of the rights you have in the State of Illinois is a right to a trial by jury. However, you may waive that right and be tried by this court. Do you understand that?
>
> THE DEFENDANT COLES: Yes, sir.
>
> THE COURT: If you wish to waive trial by jury will you kindly so indicate as I understand by signing what is called a jury waiver.
>
> (Whereupon, the defendant executed a jury waiver in open court.)"

The defendant was adequately admonished of his right to trial by jury and he knowingly and understandingly waived that

right. The effectiveness of the "admonishment" does not depend on whether the defendant was represented by the public defender, retained counsel or a volunteer attorney. See People v. Alexander (1970), 45 Ill. 2d 53, 256 N.E. 2d 785.

The defendant was not denied a fair trial under the rule announced in United States v. Wade (1967), 388 U.S. 218, since the lineup here was held prior to indictment. Kirby v. Illinois (1972), 406 U.S. 682, affirming People v. Kirby (1970), 121 Ill. App. 2d 323, 257 N.E. 2d 589, and by implication, People v. Palmer (1969), 41 Ill. 2d 571, 244 N.E. 2d 173, is dispositive of defendant's contention that he was entitled to be advised of his right to counsel prior to the lineup procedure.

While a lineup procedure, irrespective of the presence of counsel, may be so unfair and suggestive as to deny a defendant due process under the rule announced in Stovall v. Denno (1967), 388 U.S. 293, no such showing has been made on the facts here. The most recent Illinois Supreme Court expression on this subject is in People v. Pierce (1972), 53 Ill. 2d 130, 135-136, 290 N.E. 2d 256, which held that the complainant cab driver's identification of the defendant as the man who robbed him had a "source independent of the lineup" in question and thus affirmed defendant's conviction for armed robbery.

It is evident from the transcript of the proceedings that the trial judge was concerned about the reliability of the lineup, based upon the fact that the police report had initially shown that the complainant had identified the culprit as Larry Jones, rather than the defendant. On the other hand, complainant denied having done so, and Officer Lundin, who was present, testified that complainant had not done so, and that he thought that he was the one who had crossed out that statement in the police report. This testimony appears adequate to support the conclusion that the inclusion of that statement in the police report was simply a mistake.

In any event, the court made very clear that it found the testimony of the complainant believable and the alibi testimony of the defendant and his witness not believable. The complaining witness made a positive identification under conditions where the lighting was bright and she had sufficient opportunity to observe the defendant. Under these circumstances, the credibility of the witnesses was a matter primarily for the trial court and the complainant's identification of the defendant as the man who robbed her had a source independent of the lineup in question. The defendant was proven guilty beyond a reasonable doubt. People v. Bey (1972), 51 Ill. 2d 262, 281 N.E. 2d 638; People v. McCorry (1972), 51 Ill. 2d 343, 282 N.E. 2d 425.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Publish Abstract Only.

10 I.A.3 1061

NO. 57352

| | | |
|---|---|---|
| CATHERINE BROWN, | ) | APPEAL FROM |
| | ) | CIRCUIT COURT |
| Plaintiff-Appellee, | ) | COOK COUNTY |
| | ) | |
| vs. | ) | |
| | ) | |
| THE CITY OF CHICAGO, etc., et al., | ) | HONORABLE |
| | ) | DANIEL A. COVELLI, |
| Defendants-Appellants. | ) | PRESIDING. |

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

The City of Chicago, a municipal corporation, and Richard J. Daley, Mayor of the City of Chicago and Local Liquor Control Commissioner, appeal from a temporary injunction order entered on January 13, 1972, by which they "are restrained and enjoined during the pendency of these proceedings from denying the issuance of a Retailers' Liquor License to the plaintiff to operate a tavern business at 7856 S. Ashland Ave., Chicago, Illinois."

The record discloses that the plaintiff, Catherine Brown, operated a tavern at 7716 South Halsted until 1970. In November, 1970 she leased premises at 7856 South Ashland for use as a tavern. In December, 1970 she made application for transfer of her liquor license to the Ashland address. Upon filing her application she was told by the Liquor Licensing Department that she would be permitted to operate a tavern at 7856 South Ashland and the adjoining address.

Subsequently, plaintiff received notice from the City that her license could not be transferred for the reason that the premises to be licensed were located within 100 feet of a church. Plaintiff appealed to the License Appeal Commission, and on March 12, 1971 an order was issued commanding the City of Chicago and the Local Liquor Control Commissioner to issue a license to the plaintiff for the purposes of operating a tavern business. No appeal was taken from this order and a transfer of license was issued on April 7, 1971.

A few days later plaintiff opened the tavern. She had leased the building in November, 1970 but had not been able to open until mid-May due to the lack of the liquor license. During April and May of 1971 plaintiff contracted for remodeling of the premises which was completed about June 3, 1971 at a cost of approximately $20,000.

On May 14, 1971, the City issued a renewal license.

On June 7, 1971 plaintiff responded to a letter from the City regarding her license, and was told that her license had been issued in error as the area was not zoned for a tavern, and that for this reason the City would put a "hold" on her license. The City permitted her to operate until the license expired in November, 1971. The tavern has been closed since that time.

Plaintiff filed suit seeking damages for losses occasioned by the closing of the tavern and for an order enjoining the City from interfering with her right to a retail liquor license. A petition for temporary injunction was filed December 1, 1971. After a hearing the circuit court on January 13, 1972 enjoined the defendants "during the pendency of these proceedings from denying the issuance of a Retailers' Liquor License to the Plaintiff to operate a Tavern business at 7856 S. Ashland Ave., Chicago, Illinois upon the basis that said operation is in violation of Sec. 194(A) of the Municipal Code of the City of Chicago and that said license issue instanter upon payment of required fees." Defendants appealed from this order.

Although the plaintiff filed no brief in this court, the case will be reviewed on its merits. Logan Furniture Mart v. Davis (1972), 8 Ill. App. 3d 150, 289 N.E. 2d 228, Halzel v. City of Chicago (1972), 7 Ill. App. 3d 152, 287 N.E. 2d 331.

The defendants argue that they are not estopped to refuse the renewal of the plaintiff's liquor license which was issued in violation of the Municipal Zoning Ordinance. However, the

merits of the litigation are not the issue in an appeal from a temporary judgment order. It is not the purpose of a temporary injunction to determine controverted rights or to decide the merits of the case. Seay & Thomas, Inc. v. Kerr's, Inc. (1965), 58 Ill. App. 2d 391, 401, 208 N.E. 2d 22. Therefore, the only issue is whether the trial court abused its discretion in issuing the temporary injunction.

The purpose of a temporary injunction is to maintain the status quo and preserve the equitable rights of the parties, until the court has the opportunity to consider the case on its merits. Seay & Thomas, Inc. v. Kerr's, Inc. (1965), 58 Ill. App. 2d 391, 208 N.E. 2d 22; Nelsen & Sons v. Gen. American Development Corp. (1972), 6 Ill. App. 3d 6, 9, 284 N.E. 2d 478. Unless the court finds that the trial court's discretion has been abused the interlocutory order will not be reversed or set aside. Seay & Thomas, Inc. v. Kerr's, Inc. (1965), 58 Ill. App. 2d 39, 208 N.E. 2d 22; Keeshin v. Schultz (1970), 128 Ill. App. 2d 460, 467, 262 N.E. 2d 753.

The plaintiff has presented a prima facie case for the issuance of a temporary injunction. The evidence adduced at the hearing tends to establish that the defendants wrongfully denied a liquor license to the plaintiff to conduct the business of a tavern at 7856 South Ashland Avenue, Chicago, Illinois. Furthermore, if the temporary injunction was not to be allowed, plaintiff's success on the merits could be without meaning, because the plaintiff would suffer a large financial loss, since the tavern has remained closed since November, 1971. Cf. Nelsen & Sons v. Gen. American Development Corp. (1972), 6 Ill. App. 3d 6, 9, 284 N.E. 2d 478.

The trial court did not abuse its discretion in issuing the temporary injunction order and, therefore, the order of the trial court is affirmed.

Order affirmed.

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